(22,271)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 108.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY, AND B. C. FINNEGAN, APPELLANTS,

vs.

JOHN E. LUNDRIGAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JULY 19, 1912.

a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1909, of said Court, Before the Honorable Walter H. Sanborn and the Honorable Elmer B. Adams, Circuit Judges, and the Honorable John A. Riner, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it remembered that heretofore, to-wit, on the thirtieth day of September, A. D. 1909, a transcript of record pursuant to an appeal allowed by the Circuit Court of the United States for the District of Minnesota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan were Appellants and John E. Lundrigan was Appellee, which said transcript of record is in the words and figures following, to-wit:

1 United States Circuit Court, District of Minnesota, Fifth Division.

No. 656. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY, and B. C. FINNEGAN, Complainants,
vs.
THE SANTA FE PACIFIC RAILROAD COMPANY, and J. E. LUNDRIGAN, Defendants.

Appearances:

C. D. O'Brien, St. Paul, Minnesota, and P. H. Seymour, Duluth, Minnesota, Solicitors for Complainants.
Wm. E. Culkin and L. C. Harris, Duluth, Minnesota, Solicitors for Defendants.

Pleas in the United States Circuit Court, District of Minnesota, Fifth Division, in the Above Entitled Cause.

Be it Remembered That on the 9th day of March, A. D. 1908, there was filed with the Clerk of said Court, at his office in Duluth, said District and Division, the Bill of Complaint in said cause, in the words and figures following, to-wit:

To the Judges of the Circuit Court of the United States for the Fifth Division of the District of Minnesota:—

John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, citizens of the State of Minnesota, bring this bill of complaint against the Santa Fe Railroad Company, incorporated under the Act of Congress, March 3rd, 1897, having its principal place of business at Topeka, in the State of Kansas, and J. E. Lundrigan, a citizen of the County of Itasca and State of Minnesota, and thereupon your orators complain and allege:

That your Honors have jurisdiction of the matters and things hereinafter set forth, because the questions involved arise as hereinafter set forth under the laws of the United States.

Your orators further allege, that on January 24th, 1901, John E. C. Robinson, one of the complainants herein, a citizen of the United States and of the State of Minnesota, applied at the United States Land Office at Cass Lake, Minnesota, as the assignee of James Carroll, to enter Section 2306 of the Revised Statutes of the
2 United States, the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of Section Thirteen (13), Township Fifty-five (55) North, Range Twenty-six (26) West of the Fourth Principal Meridian, said land being unappropriated public land of the United States, and subject to entry under its public land laws, and situated in the Fifth Division of the District of Minnesota. That by good and sufficient conveyance duly recorded in the office of the Register of Deeds for Itasca County, Minnesota, wherein said land is situated, the complainants, Beckfelt, Fay and Finnegan, have succeeded to the three-quarter (¾) undivided interest in and to all the right, title and interest of said Robinson in and to said land.

That at the time of making said application, said Robinson surrendered as consideration for the land applied for, the assignment to him from James Carroll, accompanied by proofs, showing prima facie said Carroll to be entitled to make a soldier's additional homestead entry under said Section 2306, of the United States Revised Statutes. That said application was duly entered as of record upon the tract and plat book at said Cass Lake Land Office, and that the assignment of Carroll and proof of his claim for additional homestead right, was duly transmitted to the General land Office for examination and action. That upon investigation, it was found by the General Land Office that said Carroll was not entitled to make an additional homestead entry, and on March 23rd, 1904, the Commissioner of the General Land Office, held for rejection, Robinson's application aforesaid, and on January 28th, 1905, ordered a hearing to be had at the United States Land Office at Cass Lake, Minnesota, at which said Robinson might offer evidence in support of the validity of the additional homestead right of said Carroll. That the land officers ordered a hearing to be had June 20th, 1905, at which time there was no appearance for said Robinson, and on July 15th, 1905, said land officers rendered their decision holding that said Carroll was not entitled to an additional homestead right, under Section 2306 of the Revised Statutes, and recom-

mended that Robinson's application to make entry as assignee of said Carroll be rejected, and on the same date issued notice to said Robinson of their said findings and recommendation, and of his right of appeal therefrom. That on July 27th, 1905, within the time allowed for appeal, said Robinson filed with the local land office, for transmission to the Commissioner of the General Land Office, an application for leave to substitute in support of the said application to make entry, another soldier's additional homestead right, in lieu of that of said James Carroll. That on August 29th, 1905, the Commissioner of the General Land
3 office, directed the land officers at said Cass Lake Land Office, to notify said Robinson that he was allowed thirty days from the receipt of such notice within which to file a proper substitute for the additional homestead right of said Carroll, further directing that if at the expiration of said period, said Robinson had not filed such substitute, they, the said local land officers should hold the said land subject to entry from that time, by the first qualified applicant. That in accordance with said direction of the Commissioner of the General Land Office, notice was issued by the land officers at Cass Lake, Minnesota, on September 5th, 1905, to said Robinson, to make such substitution, and that said Robinson did on October 4, 1905, substitute for the additional homestead right of said Carroll, which had been found to be invalid, the additional homestead right of Justus F. Heath.

That on February 15th, 1906, the Commissioner of the General Land Office, accepted said substitution, and directed the local land officers at said Cass Lake Land Office, that upon payment by said Robinson of the legal fees and commissions, within sixty days from service of notice upon him of such requirement, they should allow the entry to be made by said Robinson, assignee of Justus F. Heath, and issued to him the original and final receipts and final certificate. That in accordance with the notice served upon him, pursuant to such direction, said Robinson on March 2, 1906, paid to the said land officers at Cass Lake, Minnesota, the final fee and commissions due upon said entry, and thereupon final certificate No. 715, Cass Lake, Minnesota series, was issued to him.

That pending these proceedings, to-wit: On July 11th, 1905, prior to any final action by the land department upon the application of said Robinson to enter said described land, the defendant the Santa Fe Railroad Company, by J. E. Lundrigan, its attorney in fact for that purpose, filed in said land office at Cass Lake, Minnesota, its application to select said described land, under the Act of Congress of June 4th, 1897, which said application was received by the land officers, subject to final action upon the prior application of said John E. C. Robinson. That upon the allowance of the application of said Robinson and the issuance to him of final certificate No. 715 aforesaid, the said land officers at Cass Lake, Minnesota, rejected the application of said Santa Fe Pacific Railroad Company to select said land, from which rejection said Railroad Company by its attorney, appealed to the Commissioner of the General Land Office. That on June 14, 1906, the said Commis-

sioner of the General Land Office rendered a decision, hold-
4 ing that the said application of the Santa Fe Pacific Railroad Company constituted a valid intervening adverse right to said tract such as to bar the substitution by said Robinson of a valid soldier's additional homestead right, for that of said James Carroll basing said decision upon that of the Secretary of the Interior, rendered March 24th, 1906, in the case of Maginnis, assignee of Davis, and accordingly held for cancellation, said final entry No. 715, of said Robinson, assignee of Heath. That your orator, B. C. Finnegan, as [on] of the transferees of said Robinson, only appealed from said decision to the Honorable Secretary of the Interior, who upon February 25th, 1907, affirmed said decision of the commissioner of the General Land Office. That upon motion for review of said decision, the same was affirmed by the Secretary of the Interior, by his decision of May 13th, 1907. And that on July 19th, 1907, upon petition for re-review of said decision, the said Secretary of the Interior reaffirmed the said decisions of February 25th, 1907, and May 13th, 1907.

That in pursuance of said decisions of the Secretary of the Interior of February 25th and May 13th, 1907, the Commissioner of the General Land Office on May 18th, 1907, directed the land officers at Cass Lake land office, to cancel said entry of said Robinson, assignee of Heath, and the same was cancelled at said land office upon May 21st, 1907. That thereafter, to-wit, on the 20th day of July, 1908, a patent for said land was issued and delivered by the United States to the said Santa Fe Pacific Railroad Company. The said decisions of the Honorable Secretary of the Interior were, and it so appears upon their face, based solely upon the ground and assumption that the right granted to said Robinson to substitute a valid soldier's additional homestead right, in place of James Carroll, in support of his application to enter said land, was without authority in the face of the intervening application of said Santa Fe Pacific Railroad Company; and that the granting of such substitution was a final determination of the rights of said Robinson, under his original application, and became effective only as of the date when made, and subject to any intervening application.

Your orators further allege that said decision was contrary to law and was due to a mistake or misconstruction of law, and that under the laws of the United States, the said land was not at any time, freed from appropriation under the said application of Robinson, filed January 24th, 1901, and was not at any time subject to selection by the said Santa Fe Pacific Railroad Company or any other person or corporation, except said Robinson.

5 Your orators further allege that for many years immediately preceding the making of the said decision of March 24th, 1906, in the case of Maginnis, assignee of Davis, and on and prior to January 24, 1901, there was in force in the Department of the Interior, a rule and regulation, and a settled practice and a long line of decisions by the department officers, providing and declaring that upon the rejection of a soldier's additional homestead right, surrender by the assignee thereof, in support of an application to

make entry of public land, under Section 2306 of the Revised Statutes of the United States, that such applicant might substitute in support of his said application, a valid soldier's additional homestead right in place of that rejected, such substitution taking effect by relation, as of the date of the application to enter; and that no right attached by virtue of any application made for land embraced in a prior application of another until such first application should be finally disposed of; a junior applicant acquiring no right by virtue of his application as against the prior applicant.

But for the aforesaid misconstruction of law, and said ignoring and violation of the aforesaid rule, practice and decisions of the Department of the Interior, the application of the Santa Fe Pacific Railroad Company to select said land would have been held by the Honorable Secretary of the Interior, invalid and ineffectual on the ground that when the same was made, said lands was embraced in and subject to the prior application of said John E. C. Robinson, and that said John E. C. Robinson would have been entitled, as in law and fact he was entitled, to receive the patent of the United States for said land.

That said Santa Fe Pacific Railroad Company has never placed upon record, the patent for said land so issued to it as aforesaid; and as your orators are informed and believe, the said J. E. Lundrigan claims to have some right, title or interest in or to said land, derived from said Santa Fe Pacific Railroad Company and from no other source; but that said Railroad Company and said defendant Lundrigan, acting together, and with the intent to embarrass and harass your orators, have failed and neglected to place upon record any pretended or alleged titles or documents which they may have conveying title to said land, and are concealing the same with the design and intent to further embarrassing your orators and protracting said litigation for said land; and your orators further pray that said defendants, and each of them, be required to fully, clearly and directly state in their answers hereto, what if any conveyance or transfers of said land have been made, by said Railroad Company,
6 or either of said defendants before or since the issuance of said patent to said Railroad Company, whether or not said Railroad Company has made any conveyance thereof, or contracts of and concerning the same, and with whom, and in whom the present alleged title of said defendants in and to said land rests.

For as much as your orators can have no adequate relief except in this court, and to the end therefore that the defendants may, if they can, show why your orators should not have the relief herein prayed, and make a full disclosure and discovery of all the matters aforesaid, and according to the best of their knowledge, information and belief, full, true and direct answers, giving to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived, and that your orators may be judged the equitable owners of the land hereinbefore described, and entitled to the legal title thereto, and that the defendants may be adjudged to hold in trust for your orators, whatever interest they or either of them may have in the legal title to said land, and may be adjudged, com-

manded and compelled to convey by suitable conveyance, to your orators, all such rights, titles and interests and estates, and that in default of such conveyances, it may be adjudged and decreed that the title to said lands be divested out of the said defendants, and invested in your orators, and for such other or further relief as to the court may seem, just, besides your orators' costs and disbursements herein.

May it please your honors to grant unto your orators, a writ of subpœna of the United States of America, directed to the said Santa Fe Pacific Railroad Company, and J. E. Lundrigan, commanding them and each of them on a day certain to appear and answer unto this bill of complaint, and to abide by and conform to said order and decree in the premises, as to the court shall seem proper and required by the practice of equity and good conscience.

P. H. SEYMOUR AND
C. D. O'BRIEN,
Solicitors for Complainants and of Counsel, Duluth, Minnesota.

STATE AND DISTRICT OF MINNESOTA,
County of Itasca, ss:

On this 29th day of October, 1908, before me a notary public in and for the County of Itasca in said State and District, personally appeared John E. C. Robinson, one of the above named complainants, who being by me duly sworn, deposes and says, that he has read the foregoing bill of complaint, and knows the contents
7 thereof, and that the same is true of his own knowledge, except as to those matters stated on information and belief, and as to those matters, that he believes it to be true.

JOHN E. C. ROBINSON.

Subscribed and sworn to before me this 29" day of October, A. D. 1908.

[NOTARIAL SEAL.] J. I. DONOHUE,
Notary Public, St. Louis County, Minnesota.

My Commission expires May 5, 1913.

Endorsed: Bill of Complaint. Filed November 9th, 1908. Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

That on the same day, to-wit: on the 9th day of November, A. D. 1908, there was filed with said Clerk a Præcipe for Chancery Subpœna in said cause, and that in compliance with the request therein contained a Chancery Subpœna was, on the same day, duly issued by said Clerk and delivered to the United States Marshal, said District, for service; and on the 30th day of November said Chancery Subpœna was returned into Court by said Marshal with his return of service thereof thereunto attached, and was duly filed by said Clerk; which said Chancery Subpœna and Return of Service are, in words and figures, as follows, to-wit:

UNITED STATES OF AMERICA,
District of Minnesota, Fifth Division.

The President of the United States of America: To The Santa Fe Pacific Railroad Company and J. E. Lundrigan, Greeting:

You are hereby commanded to be and appear at Rules, to be held at the office of the Clerk of the Circuit Court of the United States, for the District of Minnesota, on the first Monday of December next, at the City of Duluth, then and there to answer the Bill of Complaint of John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, citizens of the State of Minnesota, filed against you on the 9th day of November, A. D. 1908, hence fail not.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 9th day of November 1908.

Issued at my office in the City of Duluth, under the seal of said Circuit Court, the day and year last aforesaid.

[SEAL.] HENRY D. LANG, *Clerk.*
By THOS. H. PRESSNELL, *Deputy.*

8 *Memorandum.*

The above named defendants to enter their appearance in this suit in the Clerk's office aforesaid, on or before the day at which this writ is returnable; otherwise the bill may be taken pro confesso.

[SEAL.] HENRY D. LANG, *Clerk.*
By THOS. H. PRESSNELL, *Deputy.*

P. H. SEYMOUR AND
C. D. O'BRIEN,
Complainant's Solicitors.

DISTRICT OF MINNESOTA, *ss:*

I hereby certify and return that on the 12th day of November, 1908, I received the within Chancery Subpœna and that after diligent search, I am unable to find the within named defendant. The Santa Fe Pacific Railway Company within my district.

WM. H. GRIMSHAW,
United States Marshal.
By S. J. PICHA,
Deputy United States Marshal.

Return on Service on Writ.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I hereby certify and return that I served the annexed Chancery Subpœna on the therein-named J. E. Lundrigan by handing to and leaving a true and correct copy thereof with him at Cass Lake in said District on the 18th day of November, A. D. 1908.

WM. H. GRIMSHAW,
U. S. Marshal.
By FRED'K VAN DOREN,
Deputy.

Endorsed: Chancery Subpoena. Returned into the Clerk's Office and filed this 30th day of November A. D. 1908. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 7th day of December, A. D. 1908, there was filed with said Clerk the answer of the defendant J. E. Lundrigan, in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,

vs.

SANTA FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

9 *The Answer of J. E. Lundrigan, one of the Defendants, to the Bill of Complaint of John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Complainants in the Above-entitled Action.*

This defendant, now and at all times hereafter saving to himself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties and imperfections in the said bill of complaint contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer to, answering says:

He admits that the said complainants are citizens of the state of Minnesota, and that the defendant, the Santa Fe Pacific Railroad Company, is incorporated under an Act of Congress, having its principal place of business at Topeka, in the state of Kansas, and says this defendant is a citizen of the county of Cass and State of Minnesota.

He admits that on January 24th, 1901, John E. C. Robinson, one of the complainants herein, a citizen of the United States and of the State of Minnesota, applied at the United States Land Office, at Cass Lake, Minnesota, as the assignee of James Carroll, to enter, under Section 2306 of the Revised Statutes of the United States, the Southwest Quarter (SW¼) of the Southeast Quarter (SE¼) of Section Thirteen (13), in Township Fifty-five (55) North, of Range Twenty-six (26) West of the 4th P. M., said land being unappropriated public land of the United States, and subject to entry under its public land laws, and situated in the Fifth Division of the District of Minnesota.

Defendant further admits that the complainants Beckfelt, Fay, and Finnegan have succeeded to a three quarters undivided interest in and to any right, title or interest that the complainant Robinson may have in and to said land.

This defendant admits that, at the time of making said application, the said Robinson surrendered as consideration for the land

applied for an assignment to the said Robinson from James Carroll of an [purported] right of said Carroll to make a Soldiers Additional Homestead entry, under said section 2306 of the Revised Statutes of the United States, and that said application was duly entered of record on the tract and plat books at said Cass Lake Land Office, and that the assignment of Carroll and the proof of his claim for an additional homestead right was duly transmitted to the General Land Office for examination and action.

10 This defendant admits that upon investigation it was found by the General Land Office that said Carroll was not entitled to make an additional homestead entry, and that, on March 23, 1904, the Commissioner of the General Land Office held said Robinson's application aforesaid for rejection, and on January 28, 1905, ordered a hearing to be had at the United States Land Office, at Cass Lake, Minnesota, at which said Robinson might offer evidence in support of the validity of the additional homestead right of said Carroll.

This defendant further admits that the Land Officers ordered said hearing to be had on June 29, 1905, and that said Robinson made no appearance at said hearing, and that on July 15, 1905, said Land Officers rendered their decision, holding that said Carroll was not entitled to an additional homestead right under Section 2306 of the Revised Statutes, and recommended Robinson's application to make entry as the assignee of said Carroll be rejected, and on the same date issued notice to said Robinson of their said findings and recommendation, and of his right of appeal therefrom.

This defendant denies that on or about July 27th, 1905, the said Robinson filed with the local Land Office, for transmission to the Commissioner of the General Land Office, an application for leave to substitute another Soldier's Additional Homestead Right, in lieu of that of the said James Carroll, but alleges that on or about the 25th day of July, 1905, the said Robinson filed with the Local Land Office, for transmission to the Commissioner of the General Land Office, an application requesting that said Robinson be granted thirty days within which to rescript the said land.

A true copy of said application is hereto attached, marked Exhibit "A", and made a part hereof, to the same effect and extent as though set forth herein at length.

This defendant further admits that on or about August 29th, 1905, the Commissioner of the General Land Office directed the Local Land Officers, at said Cass Lake Land Office, to allow the said Robinson thirty days within which to locate new script on the said lands.

A true copy of said order of the Commissioner is hereto attached, marked Exhibit "B", and made a part hereof to the same effect and extent as though set forth herein at length.

Defendant further admits that, in accordance with the said order of the Commissioner, notice was issued by the Local Officers, at Cass Lake, on or about September 5th, 1905, to said Robinson,

11 permitting him to script said land, and that on or about October 4th, 1905, in pursuance of said notice, said Robinson

did file in said Cass Lake Land Office the additional homestead right of Justus F. Heath.

This defendant further admits that, on or about February 15th, 1906, the Commissioner of the General Land Office accepted said script so filed by said Robinson in lieu of the script of James Carroll, and directed the Local Land Officers at said Cass Lake Office to allow the entry of the said Robinson as assignee of Justus F. Heath, upon the payment of the said Robinson of the legal fee and commissions, within sixty days of the service of notice upon him of such requirements, and should issue to him the original and final receipt and final certificate.

This defendant further admits that, in accordance with the said notice served upon him pursuant to said direction, said Robinson, on or about March 2nd, 1906, paid to said Land Officers at Cass Lake, Minnesota, the final fee and commissions due upon said entry; and that thereupon, final certificate No. 715, Cass Lake, Minnesota, Series was issued to him.

This defendant further admits, that, on July 11th, 1905, and prior to any final action of the land department upon the application of said Robinson to enter said land, the defendant, the Santa Fe Pacific Railroad Company, by J. E. Lundrigan, its attorney in fact for that purpose, filed in said Land Office, at Cass Lake, Minnesota, its application to select said described land, under the Act of Congress of June 4th, 1897, which said application was received by the land officers to final action upon the prior application of said Robinson; and further admits that upon the issuance of the said final certificate No. 715, to the said Robinson, the said land officers at Cass Lake, Minnesota, rejected the said application of the Santa Fe Pacific Railroad Company to select said land.

This defendant further admits that upon the rejection of the said application of the Santa Fe Railroad Company, said Railroad Company, by its attorney, appealed to the Commissioner of the General Land Office, and that on June 14th, 1906, said Commissioner rendered a decision holding that the said application of the Santa Fe Pacific Railroad Company constitute a valid, intervening, adverse right to said tract, such as to bar the substitution of a valid Soldier's Additional Homestead Right for that of James Carroll, and held for cancellation said final entry No. 715 of said Robinson, assignee of said Heath.

12 A true copy of the said decision of the Commissioner of the General Land Office is hereto attached, marked Exhibit "C", and made a part hereof to the same effect and extent as though set forth herein at length.

This defendant further admits that the defendant B. C. Finnegan, as one of the transferees of the said Robinson's entry, appealed from the said decision of the Commissioner of the General Land Office, rendered June 14th, 1906, to the Secretary of the Interior, and that the latter on February 25th, 1907, rendered a decision affirming the said decision of the said Commissioner.

A true copy of the decision of the said Secretary is hereto annexed,

marked Exhibit "D", and is made a part hereof to the same effect and extent as though set forth herein at length.

This defendant further admits that said appellant, made a motion for a review of said decision of the Secretary rendered February 25th, 1907, and that, on May 13th, 1907, the Secretary of the Interior rendered a decision affirming his said decision of February 25th, 1907.

A true copy of said decision of the Secretary rendered May 13th, 1907, is hereto annexed, Marked Exhibit "E", and is made a part hereof to the same effect and extent as though set forth herein at length.

This defendant further admits that said appellant thereupon made a motion for a re-review of said decision of February 25th, 1907 and that, on July 19th, 1907, the Secretary rendered his decision affirming his said decisions of February 25th, 1907 and May 13th, 1907.

A true copy of said decision of the Secretary rendered July 19th, 1907, is hereto annexed, marked Exhibit "F", and is made part hereof to the same effect and extent as though set forth herein at length.

This defendant further admits that in pursuance of the said decisions of the Secretary, hereinbefore referred to, the Commissioner of the General Land Office, on May 18th, 1907, directed the land officers at Cass Lake Land Office to cancel said entry of said Robinson, assignee of Heath, and that the same was cancelled at said Land Office on May 21st, 1907.

This defendant denies that said decisions of the Secretary referred to and made part hereof, were contrary to law, or were due to mistake or misconstruction of the law applicable to such cases, but on the contrary alleges that said decisions were in entire accord-
13 ance and harmony with the Statutes of the United States, the decisions of the Federal Courts, and with the decisions and rules of the Department of the Interior.

This defendant admits that when the said application of the Santa Fe Pacific Railroad Company for said land was filed in the local Land Office, on July 11, 1905, that the same was subject to the final determination of said application of the said Robinson, as assignee of the Soldier's Additional Homestead Right of James Carroll, but alleges that, under the law, and under the rules and decisions of the Department of the Interior, the application of the said Santa Fe Railroad Company became effective to take and enter said land, upon the rejection by the Department of the application of the said Robinson, as assignee of the said James Carroll.

This defendant denies that, under the law, or under the rules of the Department of the Interior, the said Robinson, upon the rejection of his said application for said land, as assignee of James Carroll, had the right to rescript said land, or had the right to substitute another and valid soldiers additional right therefor, so as to adversely affect the intervening right obtained by the said Santa Fe Railroad Company, under its said application of July 11th,

1905, but alleges that, under the law, and under the rules and decisions of the Department of the Interior, the privileges granted to the said Robinson to file other script in lieu of the script of the said James Carroll, was subject to any valid, adverse application for said land pending at the time the application for the location of the soldiers additional right of said James Carroll was rejected.

This defendant admits that immediately preceding and prior to March 24th, 1906, and immediately preceding and prior to January 24th, 1906, there was a rule and practice prevailing in the Department, that upon the rejection of a soldier's additional homestead right to make an entry of public lands, the said applicant might apply for and take and enter said land with another valid soldier's additional right, but this defendant alleges that said rule and practice was limited in its application to those cases where no other, adverse right was pending, at the time the so called substituted soldier's additional right was offered at the local land office in lieu of other script which had been rejected.

This defendant admits that on the 20th day of July, 1908, the Government of the United States duly issued its patent for said premises to the Santa Fe Pacific Railroad Company and
14 alleges that said patent was duly recorded in the office of the Register of Deeds of Itasca County, Minnesota, on the 19th day of November, 1908, at 9:30 o'clock A. M. in Book 12 of Deeds on page 192.

A true copy of said patent, and of the certificate of record in the office of said Register of Deeds, is hereto annexed, marked Exhibit "G", and made a part hereof to the same effect and extent as though set forth herein at length.

This defendant further alleges that on the 18th day of November, A. D. 1908, the said Santa Fe Pacific Railroad Company, by Rose Miskella, its attorney in fact, did, by good and sufficient deed in writing convey the said premises, hereinbefore described, to this defendant, which deed was duly recorded in the office of the Register of Deeds of Itasca County, Minnesota, on the 19th day of November, A. D. 1908, at 9:30 o'clock A. M., in Book 31 of Deeds on page 259.

A true copy of said deed, and of the certificate of recording in the office of the Register of Deeds, is hereto annexed, marked Exhibit "H", and is made a part hereof to the same extent and effect as though set forth herein at length.

This defendant further alleges that, on the 4th day of February, 1905, the said Santa Fe Pacific Railroad Company duly executed and delivered to the said Rose Miskella a power of attorney in writing to convey said premises herein before described which power of attorney was duly recorded in the office of the Register of Deeds of Itasca County, Minnesota, on the 19th day of November, A. D. 1908, at 9:30 A. M., in Book 24 of M. R. on page 418.

A true copy of said power of Attorney is hereto annexed, marked Exhibit "I" and is made part hereof, to the same effect and extent as though set forth herein at length.

This defendant further says: that he is the John E. Lundigan

named as grantee in the deed hereinbefore referred to as recorded in Book 31 of Deeds on page 259, in the office of the Register of Deeds of said Itasca County, Minnesota; and avers that he is now the sole and only owner of the premises, hereinbefore described, and that no other person, or corporation has any right, title or interest in and to said premises, or any part thereof.

This defendant further says, that while the legal title to said premises has only been in this defendant since the 18th day of November, A. D. 1908, that he has been the owner of the equitable title to said premises, and has been legally entitled to a conveyance thereof from the said Santa Fe Pacific Railroad Company ever since the said script, hereinbefore referred to, was filed in the said Cass Lake, Minnesota, Land Office, on the 11th day of July, A. D. 1905, and avers that, since said date, the said Santa Fe Pacific Railroad Company has had no right, title or interest in and to said premises, or any part thereof.

This defendant denies that he has, individually, or in concert with said Santa Fe Pacific Railroad Company, withheld the instruments conveying the title to said premises from record, with the intent and design of embarrassing the complainants herein, or for the purpose of protracting the litigation over the title to said land.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said bill charged; without this, if there is any other matter, cause or thing in said complainants' said bill of complaint contained material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied is true, to the knowledge or belief of this defendant, all which said matters and things this defendant is ready and willing to answer, maintain and prove as this Honorable Court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. E. LUNDRIGAN.

WM. E. CULKIN,
LUTHER L. HARRIS,
Solicitor and of Counsel for the Defendant, J. E. Lundrigan.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 5th day of December, A. D. 1908, before me, a notary public within and for said County of St. Louis, in the said State and District, personally appeared J. E. Lundrigan, one of the above named defendants, who being by me duly sworn, deposes and says: that [—] is one of the defendants in the above entitled action; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief and as to those matters he believes it to be true.

J. E. LUNDRIGAN.

Subscribed and sworn to before me this 5th day of December, A. D. 1908.

[NOTARIAL SEAL.] T. H. CORNELL,
Notary Public, St. Louis Co.

My Commission expires Jan. 16, 1915.

EXHIBIT "A."

Department of the Interior.
United States Land Office, Cass Lake, Minn.

John E. C. Robinson, Assignee,
to
James Carroll,

In re S. W. ¼ S. E. ¼ Sec. 13 Tp. 55 N., Rge. 26 W., 4th P. M.

Now comes the assignee, John E. C. Robinson, and appeals to the Honorable Commissioner of the General Land Office from the decision of the Honorable Register and Receiver of the local land office, rendered by said office on the 15th instant, and canceling the entry of said assignee for the above described land, for the reason that said assignee defaulted at the hearing set for the 29th day of June for the purpose of hearing and determining the validity of said entry. The assignee respectfully shows and alleges that shortly prior to said 29th day of June, and for some days after appellant's mother, who is very aged, was taken seriously ill and required the care and attention of appellant; that at the time of said illness she was absent from St. Cloud, at Osseo, Minnesota; that there was no one to see, care and provide for her but appellant; that it was imperative to bring her back to St. Cloud where she could have proper care and attention; that appellant went to Osseo about the date of the hearing in the performance of the above mentioned duties, and for this reason it was impossible for him to be present at said hearing; that the aforesaid illness came about so suddenly that appellant had not the time and could not secure representation at said hearing; Appellant has no desire to incommode the Department, but, on the contrary, is ready and willing to aid and assist in the settlement and adjustment of all matters in which appellant may be interested. Appellant is deeply sensible and appreciates the seriousness of defaulting at said hearing, and does not ask that the case be reopened.

This appeal is not taken for the purpose of hindering or delaying the adjustment of long drawn out matters, but with the hope, and urgent request, that under the circumstances, appellant be given thirty days within which to rescript said above mentioned
17 tract. That in justice and equity, and under the circumstances, appellant feels that this request is not extravagent, and therefore, most respectfully asks that the decision of the Hon-

orable Register and Receiver of the Local Office be amended so as to grant appellant a reasonable time within which to perfect said entry.

Dated July 25th, 1905.

Respectfully submitted,

JOHN E. C. ROBINSON.

Filed July 25th, 1905. U. S. Land Office, Cass Lake.

EXHIBIT "B."

Department of the Interior.

"P."

File 18104.
B. A. G.
W. J. M.

J. D. Y.
I. V. W.

United States Land Office.

WASHINGTON, D. C., *Aug.* 29, 1905.

John E. C. Robinson, Assignee,
of
James Carroll.

Application under sec. 2306 R. S., for S. W. ¼ S. E. ¼, Sec. 13, Twp. 55 N., Rge. 26 W. rejected and closed, substitution allowed.

Register & Receiver, Cass Lake, Minnesota.

GENTLEMEN: January 28, 1905, this office promulgated the Departmental decision in the above entitled case of December 22, 1904, which modified decision of this office of May 14, 1904, which adhered to a former letter, denied a request for a hearing and held the application for rejection. The department instructed this office to order a hearing in the case, which order was made by said letter. And in response to your inquiry whether the burden of proof in the case rests upon Robinson stating that it appears from the order of the Department that the burden of proof rests upon him, you were advised by my letter of April 12, 1905, that your view appears to be correct. By your letter of July 31, 1905, you made report and transmitted all papers in the case. From the record it appears that the claimant was notified by registered mail sent May 22, 1905, which he received May 23, 1905, as shown by the registry return receipt of the said departmental decision and of the said
18 letter of this office, and that the hearing in the case has been set for 10 o'clock A. M., June 29, 1905, at your office, in accordance with the departmental order and my letter.

July 15, 1905, you rendered your joint decision recommending the rejection of the application, it being stated among other things that Special Agent, S. J. Coulter appeared in behalf of the Government and submitted certain evidence, but that the applicant, John

E. C. Robinson, wholly failed to appear in person or otherwise at the hearing.

The claimant was duly notified of [illegible] said decision from which he has appealed within the time allowed. The applicant "does not ask that the case be reopened", stating that he takes this appeal not for the purpose of delaying the case, but with the hope that he will be granted 30 days in which to locate new scrip on the tract and therefore merely asks that your decision be so modified as to grant him time within which to perfect said entry. This request is put on the ground that he defaulted at the hearing because of the sudden illness of his aged mother, who required his personal care and attention and whose sickness came upon her too suddenly to permit his securing proper representation at the hearing.

Your said decision is accordingly affirmed and the said application is rejected and the case closed. You will so note on your records. You will also notify the applicant that he will be allowed 30 days from notice hereof in which to file a proper substitute for the right hereby rejected, and, if at the expiration of said period the applicant has not filed such substitute, you are directed to hold the said tract subject to entry from that time by the first qualified applicant.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

F. L. R.

EXHIBIT "C".

"P."

Department of the Interior,

General Land Office.

WASHINGTON, *June* 14, 1906.

Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: March 23, 1904, the applicant, John E. C. Robinson, who, as assignee of James Carroll, had applied to enter under section 2306 R. S. the S. W. ¼ S. E. ¼, Sec. 13, T. 55 N., R. 26 W., 4th P. M., was ruled to show cause why his application should not be rejected subject to the right of appeal for the reason
19 it does not satisfactorily appear that the soldier assignor in the person who made the original entry on which the application, which was filed in January 1901, was based. A hearing having been ordered at the applicant's request and held at which the applicant defaulted, you rendered your joint decision recommending the rejection of the application from which he appealed to this office. Your action was affirmed August 29, 1905. He stated in his appeal that he did "not ask that the case be reopened", that he had not taken the appeal for the purpose of delay, but with the hope of being granted thirty days in which to locate new scrip which time for that purpose he requested. Your action was affirmed and the

application was rejected, that action, in view of the request, being made final, and the applicant allowed thirty days from notice in which to file a proper substitute for the invalid right. In accordance with that decision Robinson filed as a substitute the right of Justus F. Heath on October 4, 1905.

February 13, 1906, the Heath right having been found valid, you were directed by this office to allow Robinson to make the entry. On his compliance with the terms of that decision on March 2, 1906, you issued H. E. No. 927 and F. C. No. 715 to him as such assignee for the said tract.

July 11, 1905, you received and held the application of the Santa Fe Railroad Company, by J. E. Lundrigan, attorney in fact to select under the act of June 4, 1897, the same tract in lieu of Lot 1 of Sec. 7, T. 19 N., 2 E., G. & S. R. Mer., in the San Francisco Mountains Forest Reserve, and which you rejected subject to the right of appeal, March 2, 1906, the same day you issued the said entry papers to Robinson for the reason that the selection is in conflict with Robinson's said entry.

March 31, 1906, the selector filed an appeal from your said decision, which you transmitted together with the record. May 9, 1906, you transmitted a motion to dismiss the appeal made in behalf of Robinson.

It will be observed that at the date this office allowed Robinson time in which to file a substitute and when the substitute was filed the application to make the lieu selection had been offered, received and held junior to Robinson's application. In the case of the Northern Pacific Railway Company, vs. Charles P. Maginnis, assignee of William R. Davis, the Department held in its decision of March 26, 1906, unreopened, the facts being substantially the same as in this case, that a substitution could not be allowed in the face of the intervening adverse right of the railway company. Maginnis' application in that case was made under Sec. 2306 R. S., and it was stated that while it was pending it barred the allowance of another claim for the same land, and hence that the preferred selection of the railway company was rightly held to await final action thereon, but that when the first application failed, the selection took precedence over the second application filed by Maginnis after such selection had been received.

As the base for the lieu selection appears to be valid, Robinson's entry in view of the decision cited was erroneously allowed. You will notify him that his said entry is hereby held for cancellation and that he will be allowed sixty days from service of notice hereof to appeal herefrom, and that in the event of default therein, his entry will be cancelled without further notice to him from this office.

In case the action hereby taken shall become final your action on the selection will be reversed and the selection allowed. Notify the selector hereof.

Serve notice and make report in accordance with circular of March 1, 1900, (29 L. D., 649).

Very respectfully,

G. J. POLLOCK,
Acting Commissioner.

Held for cancellation. Robinson notified June 18, 1906. On August 13, 1906, P. H. Seymour, Esq., as attorney for B. C. Finnegan, filed appeal to G. L. O. Aug. 31, 1906. Filed in U. S. Land Office, June 18, 1906, Cass Lake, Minn.

EXHIBIT "D."

Department of the Interior.

WASHINGTON, D. C., *February* 25, 1907.

John E. C. Robinson, Assignee of Justus F. Heath, Santa Fe Pacific Railroad Co.

The Commissioner of the General Land Office:

SIR: John E. C. Robinson has appealed to the department from your office decision of June 14, 1906, holding for cancellation his entry made March 2, 1906, under the provisions of section 2306, Revised Statutes, for the SW¼ SE¼ Sec. 13, Tp. 55 N., R. 26 W., 4th P. M., Cass Lake land District, Minnesota. The right claimed by Robinson is based upon original homestead entry made by Justus F. Heath, April 5, 1869, of the N½ NW¼, Sec. 24, Tp. 20, R. 34, Sioux City, Iowa, and upon the requisite military service of the latter.

January 24, 1901, Robinson, claiming as assignee of James Carroll filed similar application for the tract described. March
21 13, 1904, your office called upon Robinson to show cause why said application should not be rejected. A hearing was held at applicants' request in order that he might establish the validity of the right claimed by him as assignee of Carroll. Robinson made default and your office August 26, 1905, affirmed the recommendation of the local officers and rejected said application, with leave to applicant to substitute a valid tract for the one rejected, and in accordance with the direction of your office Robinson filed with the local officers substituted application issued upon the right of Heath. Prior to the filing of the latter application, the Santa Fe Pacific Railroad Company by J. F. Lundrigan, attorney in fact, filed application to select said tract under the provisions of the act of June 4, 1897 (30 Stats., 36) in lieu of lot 1, Sec. 7, T. 19 N. R. 2 E., G. & S. R. M. in the San Francisco Mountains Forest Reserve which application was received and held by the local officers subject to the right of Robinson until March 2, 1906, the date the latter's substituted application was allowed, when it was rejected. It is from the decision of your office reversing the action of the local officers and

holding the right of Robinson under his substituted application subject to the right of the railroad company the pending appeal is taken.

A distinction is attempted to be drawn by counsel for appellant between the facts presented in the case at bar and those presented in the case of Northern Pacific Railway Company vs. Charles P. Maginnis (unreported), decided by the department March 26, 1906, in this that the first application of Maginnis has been prosecuted to a final determination prior to his offer of substitution while in the present case Robinson stated in his appeal to your office that he did not desire to prosecute the same in the event he was allowed the alternative relief asked, namely, the right to substitute a valid right for the one rejected. He asserts therefore that his right under the first application was never prosecuted to final determination as in the Maginnis case and that the allowance of the right of substitution is proper and that his claim thereunder attached as of the date of the filing of the original application. The department is clearly of opinion a recognition of the attempted distinction of counsel could only result in the destruction of the principle involved in the Maginnis case, supra. Under the rule announced therein your office was without authority to permit the substitution asked by Robinson in the face of an intervening adverse claim. It is not denied that the application of the Railroad Company was filed prior to the attempted substitution nor that its acceptance by the local officers when presented in conformity with the settled practice, obtaining in such cases. This practice as was pointed out in the departmental
22 decision in the case of Frederick L. Gilbert et al. (35 L. D.), arises of necessity, because of want of authority of the local officers to pass upon and allow or reject application of this character when presented. Robinson can not escape the consequences growing out of his request to substitute a valid for an invalid right. The granting thereof was, in effect, a final determination of his rights under the original application and he is charged with notice of what the record contained at the time such request was made. At that date the application of the railroad company was a matter of record and any rights initiated by Robinson subsequent thereto were subject to those of the railway company under its application. The contention of counsel that the claim of Robinson under his substituted application should attach by relation as of the date of the filing of his original application is the same as the one advanced in the Maginnis case, supra, and denied by the department. The case under consideration falls within the rule therein laid down, and the decision appealed from must, therefore, be affirmed.

The papers are herewith.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

Secretary decides against Robinson. Notice to P. H. Seymour as attorney for transferee, R. C. Finnegan, sent March 11, 1907. Received by P. H. S. On March 13, 1907. Reported to G. L. O.

April 15, 1907. Motion for review filed April 16, 1907, by P. H. Seymour as attorney for transferee B. C. Finnegan to G. L. O. April 18, 1907. Filed in U. S. Land Office March 11, 1907, Cass Lake, Minn.

EXHIBIT "E."

Department of the Interior.

WASHINGTON, D. C., *May* 13, 1907.

John E. C. Robinson, Assignee of Justus F. Heath, Santa Fe Pacific R. R. Co.

The Commissioner of the General Land Office,

SIR: B. C. Finnigan, transferree of John E. C. Robinson, has filed motion for review of departmental decision of February 25, 1907, unreported, holding for cancellation the entry of said Robinson allowed under the provisions of Section 2306, 23 Revised Statutes, for the S. W. ¼ S. E. ¼ Sec. 13, Tp. 55 N., R. 26 W. 4th P. M., Cass Lake Land District, Minnesota. The entry in question was allowed March 2, 1906, on substituted soldier's additional rights and in the face of a pending application filed by the Santa Fe Pacific Railroad Company to select said tract under the provisions of the act of June 4, 1897, (30 Stats., 36).

It is claimed that the department erred in applying to the case the rule followed in the case of Northern Pacific Railway Company vs. Chas. P. Maginnis, unreported, decided March 26, 1906. The cases are in all material respects the same, and the distinction attempted to be drawn by counsel was fully noticed and considered in the decision sought to be reviewed.

It is further contended that rights of the character here involved are prejudiced by the denial of the right of substitution in the face of an adverse claim, and that such action should not be taken as against purchasers of such rights who apply to make entry thereunder prior to the date of the decision in the Maginnis case supra. In the opinion of the department the equities claimed are not entitled to such consideration.

No right of entry is gained by the filing of an invalid application to enter, and upon the rejection thereof, the rights of subsequent applicants attach in the order in which they are asserted. By admitting the rights of substitution, irrespective of the intervening rights, the mere filing of an individual soldier's additional application would in effect amount to a segregation of the land. The refusal of the department to adopt such a practice does not prejudice the holder of a valid right. The only value of such right lies in the power of the holder to enter thereunder any land subject to the date of filing his application. This right is not denied in the present case, as the land there involved was subject thereto only in event there were no prior adverse claims asserted upon which entry should be allowed. The right itself is not destroyed by refusing to allow

entry thereunder of this particular tract. The purchaser still has all that he bargained for, and the mere fact that his purchase may have been made upon a mistaken idea that he would be entitled as a matter of right to exercise it upon a particular tract of land does not entitle him to equitable consideration as against the prior and therefore superior right of another. After a most careful consideration of all the matters urged, in support of the pending motion the department finds no sufficient reason for disturbing the decision complained of, and said motion is accordingly hereby denied.

24 The papers are herewith returned.

Very respectfully,

J. R. GARFIELD, *Secretary.*

Entry canceled. Case closed. P. H. Seymour and John E. C. Robinson advised May 25, 1907. Filed in U. S. Land Office May 21, 1907. Cass Lake, Minn.

M. T. D. C. H. E. O. P.

EXHIBIT "F."

JULY 19, 1907.

John E. C. Robinson, Assignee of Justus Heath, Santa Fe Pacific Railroad Co.

Re-Review.

The Commissioner of the General Land Office.

SIR: The Department has before it motion for re-review of its unreported decision of February 25, 1907, filed on behalf of B. C. Finnegan, transferee of John E. C. Robinson. By the decision complained of motion for review of which was denied May 13, 1907 (decision not reported), the entry of said Robinson, allowed under the provisions of section 2306, Revised Statutes, for the S. W. ¼ S. E. ¼ Sec. 13, T. 55 N., R. 26 W., 4th P. M., Cass Lake land district, Minnesota, was held for cancelation.

The facts upon which the action taken is based are clearly set forth in the decisions heretofore rendered and a re-statement of them is unnecessary to a determination of the question presented by the pending motion.

It is insisted by counsel that the substituted application of Robinson was presented prior to the rule announced in departmental decision rendered March 26, 1906, in the case of Charles P. Maginnis (unreported) and was in strict conformity with the practice then prevailing and that the Department is without authority to change the rule to the prejudice of prior applicants.

The case of Germania Iron Co. v. James (89 Fed. Rep. 811) is cited and relied upon to support this contention. In that case the court held that a just and reasonable rule of administration adopted and applied by the Department became a rule of property and could not be altered to the prejudice of those who had initiated rights un-

der such practice. But the rule contended for by counsel as governing the case under consideration is neither reasonable or just. Robinson attempted to initiate a right by relying upon the invalid claim of another, and insists that even though the Department would be unwarranted in recognizing such claim he could be allowed to perfect the right thus asserted to the prejudice of a valid intervening right, of which he had notice by the substitution of another different right.

The simple statement of the facts destroys all the argument in support of such practice. There is neither reason nor equity in it. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment and of these the first was worthless and prior to the assertion of the second the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted.

After carefully considering the matters advanced in support of the motion for re-review, the Department finds no sufficient ground for entertaining it, and the same is hereby denied.

The papers are herewith.

Very respectfully,

GEO. WOODRUFF,
Acting Secretary.

EXHIBIT "G."

The United States of America to all to whom these presents come, Greeting:

Section No. 15282.

Whereas, The Santa Fe Pacific Railroad Company, being the owner of a tract of land situated and included within the limits of a public forest reservation, known and officially designated as the San Francisco Mountains Forest Reserve, in Arizona, has under the provisions of the Act approved June 4, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said Act, selected in lieu thereof the following-described tract of vacant land now open to settlement, to-wit:

The Southwest quarter of the southwest quarter of Section thirteen in Township fifty-five north of Range twenty-six west of the Fourth Principal Meridian, Minnesota, containing forty acres,

Now Know Ye, That the United States of America, In consideration of the premises, Has Given And Granted, and by these presents Does Give and Grant unto the said Santa Fe Pacific Railroad Company, and to its successors, the lands above described; To Have And to Hold the same, together with all the rights, privileges, immunities, and appurtenances, of whatsoever nature

thereunto belonging, unto the said Santa Fe Pacific Railroad Company and to its successors and assigns forever.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made Patent, and seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twentieth day of July, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States the one hundred and thirty-third.

By the President:

THEODORE ROOSEVELT,
By M. W. YOUNG, *Secretary.*

[SEAL.] JOHN O'CONNELL,
Acting Recorder of the General Land Office.

Recorded, 4633; Vol. —, Page —.

No. 42343.

Office of Register of Deeds.

County of Itasca, Minn.

I hereby certify that the within instrument was filed in this office for record on the 19th day of Nov. A. D. 1908, at 9.30 o'clock A. M. and was duly recorded in *Book* 12 of Deeds, page 192.

E. J. McGOWAN,
Register of Deeds.
IRENE BECKER,
Deputy.

EXHIBIT "H."

This Indenture, Made this 18th day of November, in the year of our Lord one thousand nine hundred eight between. The Santa Fe Pacific Railroad Company, a corporation duly incorporated under an Act of Congress, approved March 3, 1897, party of the first part, and John E. Lundrigan of the Village of Cass Lake. County of Cass, and State of Minnesota, party of the second part,

Witnesseth, that the party of the first part, in consideration of the sum of Three Hundred and no/100 dollars, it is in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, do by these presents Grant, Bargain, Sell, Release and Quitclaim to the said party of the second part, his heirs and assigns, Forever all the following piece or parcel of land lying
27 and being in the County of Itasca and State of Minnesota, described as follows, to-wit: The southwest quarter of the southwest quarter of section thirteen (S. W. ¼ S. E. ¼, Sec. 13), township fifty-five north (Twp. 55 N.,) of range twenty six west (Rge. 26 W.,) of the fourth principal meridian (4th P. M.) con-

taining forty acres, according to the government survey thereof, be the same more or less.

To Have And To Hold the above quitclaim premises, together with all and singular the hereditaments and appurtenances thereto belonging, or in anywise appertaining to the said party of the second part his heirs and assigns Forever,

In Testimony Whereof, The said party of the first part has hereunto set its hand and seal the day and year first above written.

[SEAL.] SANTA FE PACIFIC RAILROAD COMPANY,

[SEAL.] By ROSE MISKELLA,
Its Attorney in Fact.

Signed, Sealed and Delivered in Presence of
H. N. HARDING,
CHAS. A. GRAHAM.

STATE OF MINNESOTA,
County of Cass:

On this 18th day of November, A. D. 1908, before me, a Notary Public in and for said Cass County, Minnesota, personally appeared Rose Miskella, the duly constituted and appointed agent and attorney for the Santa Fe Pacific Railroad Company to me personally known to be the same person described in and who executed the foregoing deed, and acknowledged that she executed the same freely and voluntarily, as her free act and deed, and also as the free act and deed of the said Santa Fe Pacific Railroad Company.

H. N. HARDING,
Notary Public, Cass County, Minn.

My commission expires Oct. 1st, 1911.

28 Office of Register of Deeds.

STATE OF MINNESOTA,
County of Itasca, ss:

I hereby certify that the within Deed was filed in this office for record on the 19th day of Nov. A. D. 1908, at 9:30 o'clock A. M., and was duly recorded in Book 31 of Deeds on page 259.

E. J. McGOWAN,
Register of Deeds,
By IRENE BECKER, *Deputy.*

Taxes paid and transfer entered this 19th day of Nov. A. D. 1908.
MASPANG, *County Auditor.*

I hereby certify that taxes for the year 1907 on the lands described within are paid.

A. D. KREMER,
County Treasurer.

3367.

EXHIBIT "L"

Power of Attorney to Convey Lieu Lands.

Know All Men By These Presents, That

Whereas, The Santa Fe Pacific Railroad Company, a corporation duly incorporated under the Act of Congress, approved March 3, 1897, has relinquished to the United States of America, under the Acts of June 4, 1897, and June 6, 1900, the following described lands located within the San Francisco Mountains Forest Reserve, Territory of Arizona, to-wit: Lot numbered one of section seven, township nineteen north, range two east of the Gila and Salt River Base and Meridian, Arizona, containing forty acres, more or less; and

Whereas, The Santa Fe Pacific Railroad Company is entitled to select, in lieu of the lands so relinquished to the United States, a like quantity of vacant, surveyed, non-mineral public lands of the United States which are subject to homestead entry:

Now, Therefore, The Santa Fe Pacific Railroad Company has made, constituted and appointed Rose Miskella of Cass Lake, Minnesota, its true and lawful agent and attorney, for it, and in its name place and stead, to convey by quit-claim deed all the right, title, interest and claim which the Santa Fe Pacific Railroad Company has, or may hereafter acquire, in the lands so selected or located
29 by said Santa Fe Pacific Railroad Company, or its duly appointed attorney in fact in lieu of the above described tract or tracts of land relinquished as aforesaid, in whole or in part, to the full amount of the land so relinquished, as such selection shall have been actually made at the United States District Land Office and which shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C., as the lieu lands so selected.

Giving And Granting unto the said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in the above premises, as fully to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said attorney shall lawfully do or cause to be done by virtue of these presents.

And the said Santa Fe Pacific Railroad Company to any grantee in any conveyance executed by said attorney hereby gives notice that said attorney hereunder has authority to convey, in whole or in part, only the lands actually selected in lieu of the premises hereinabove specifically described as such lands shall appear described upon the public records in the office of the Commissioner of the General Land Office of the United States at Washington, D. C.; and any substantial variance between the description of the lieu lands so selected, as the same shall appear described upon such public records, and the premises conveyed by said attorney as such lieu lands shall render any conveyance of the latter hereunder void.

In Witness Whereof, The Santa Fe Pacific Railroad Company has caused this instrument to be signed by its president and attested by its Secretary with its seal this 4th day of February, A. D. 1905.

[SEAL.] SANTA FE PACIFIC RAILROAD COMPANY,
By E. P. RIPLEY, *President.*

Attest:
L. U. DUNING, *Secretary.*

Signed, Sealed and Delivered in presence of
J. E. ENGLE,
F. E. RAND, *Witnesses.*

STATE OF ILLINOIS,
County of Cook, ss:

On this 4th day of February A. D. 1905, before me, Edward J. Engel, a Notary Public in and for said County and State, personally appeared E. P. Ripley, to me personally known to be the President of the Santa Fe Pacific Railroad Company, and who as such President executed the within instrument on behalf of the corporation therein named; that the said E. P. Ripley, being by me duly sworn, did say that he is the President of said Santa Fe Pacific Railroad Company, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed on behalf of said corporation by authority of its Board of Directors; and the said E. P. Ripley acknowledged to me that such corporation executed the same, and said instrument to be the free act and deed of said corporation.

In Witness Whereof, I have hereunto set my hand and affixed my Notarial Seal, the day and year above written.

EDWARD J. ENGEL,
Notary Public.

My Commission expires April 17, 1905.

No. 42344.

Office of Register of Deeds.

County of Itasca, Minn.

I hereby certify that the within instrument was filed in this office for record on the 19th day of Nov. A. D. 1908 at 9:30 o'clock A. M., and was duly recorded in Book 24 of M. R. page 418.

E. J. McGOWAN,
Register of Deeds.
By IRENE BECKER,
Deputy.

Endorsed: Answer of Defendant J. E. Lundrigan. Filed December 7th, 1908. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy.

That on the 18th day of December A. D. 1908, there was filed with said clerk a Disclaimer by defendant The Santa Fe & Pacific Railway Company in said cause, in the words and figures following, to-wit:

In the Circuit Court of the United States District of Minnesota, Fifth Division.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A FAY, and B. C. FINNEGAN, Complainants,

vs.

THE SANTE FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

The Separate Answer of The Santa Fe Pacific Railroad Company, One of the Above Defendants to the Bill of Complaint of John
31 *E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Plaintiffs:*

This Defendant now and at all times hereafter saving to itself all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, [-certainties] and imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for it to make answer to, answering saith:

This defendant says that it disclaims any right, title, or interest in or to the S. E. Quarter of the S. E. Quarter of Section 13, Township 55 North Range 26 West of the Fourth Principal Meridian, being the land described in the said bill of complaint and which is the subject matter of litigation thereof. This defendant says that any title which at any time may have been vested in it in respect to said lands was prior to the institution of the above suit conveyed by it to the said defendant, J. E. Lundrigan, and that at the time of the institution of said suit, J. E. Lundrigan was and still is the only party interested as defendant in respect to the title to said lands, but that this defendant is not interested in the matter set forth and sought to be litigated in said bill of complaint; and

This defendant denies all and all manner of unlawful combination and confederacy wherewith it is by the said bill charged and humbly prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

THE SANTA FE PACIFIC RAILROAD COMPANY,
By ERDMIER LATHRUP,
ROBERT S. DUNLOP, *Its Solicitors.*

Endorsed: Disclaimer. Filed Dec. 18, 1908, Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

That on the 13th day of April A. D. 1909, there was filed with said Clerk stipulation as to the hearing and Exhibits to be filed, in the words and figures following, to-wit:

In the Circuit Court of the United States, District of Minnesota, Fifth Division.

In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,

vs.

THE SANTA FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

32 It is stipulated by and between the counsel of the respective parties to the above entitled cause as follows, viz:

That the hearing in the above entitled cause may be had and said cause submitted for determination upon complainant's bill of complaint and the answer of defendants, and that the record for such hearing shall be composed of said bill and answer, and documentary evidence filed by complainants and defendants, as follows:

By Complainants:

1. Copy of the record of the entries and applications involving the S. W. ¼ S. E. ¼, Sec. 13, Tp. 55, N., R. 26 W. 4th P. M. certified by the Register of the U. S. Land Office at Cass Lake, Minnesota and marked Complainant's Ex. No. 1.

2. Letter of the Assistant Commissioner of the General Land Office, dated December 29, 1908, addressed to P. H. Seymour, in the matter of the latter's request for certain certified copies, including the application of John E. C. Robinson, Assignee of Carroll, marked Complainant's Ex. No. 2.

3. Letter of the Assistant Commissioner of the General Land Office addressed to the Register and Receiver, Cass Lake, Minnesota, under date of March 23, 1904, in the matter of John E. C. Robinson, assignee of James Carroll, marked Complainant's Ex. No. 3.

4. Letter of the Commissioner of the General Land Office, addressed to the Register and Receiver, Cass Lake, Minnesota, under date of January 28, 1905, in the matter of John E. C. Robinson, assignee of James Carroll, marked Complainants' Ex. No. 4.

5. Order for hearing, dated May 22, 1905, addressed by the Receiver of the U. S. Land Office at Cass Lake, Minnesota, to John E. C. Robinson, in the matter of said Robinson, assignee of Carroll.

6. Copy of Registry return receipt, postmarked at delivering office, May 23, 1905, signed "John E. C. Robinson". Marked Ex. No. 6.

7. Copy of decision by the Register and Receiver of the U. S. Land Office dated at Cass Lake, Minnesota, July 15, 1905, in the matter of John E. C. Robinson, assignee of James Carroll, marked Complainant's Ex. No. 7.

8. Copy of notice dated Cass Lake, Minnesota, July 15, 1905, in

the matter of John E. C. Robinson, assignee of James Car-
33 roll, addressed to said John E. C. Robinson, marked Complainants' Ex. No. 8.

9. Copy of Registry return receipt, dated July 17, 1905, signed John E. C. Robinson, marked Complainants' Ex. No. 9.

10. Copy of appeal of John E. C. Robinson, in the matter of said John E. C. Robinson, assignee of James Carroll, dated July 15, 1905, marked Complainants' Ex. No. 10.

11. Copy of letter of the Acting Commissioner of the General Land Office, dated August 29, 1905, addressed to the Register and Receiver, Cass Lake, Minnesota, in the matter of John E. C. Robinson, assignee of James Carroll, said copy being the three detached sheets marked respectively Complainants' Ex. 11*a*, 11*b* and 11*c*.

12. Copy of letter dated Cass Lake, Minnesota, September 5, 1905, addressed by the Register of the U. S. Land Office to John E. C. Robinson, marked Complainants' Ex. No. 12.

13. Copy of Registry return receipt dated September 6, 1905, and signed John E. C. Robinson, marked Complainants' Ex. No. 13.

14. Copy of application of John E. C. Robinson, assignee of Justus F. Heath, filed October 4, 1905, and of the certificate of the Register of the U. S. Land Office at Cass Lake, Minnesota, accompanying the same, marked Complainants' Ex. No. 14.

15. Copy of letter of the Commissioner of the General Land Office, dated February 15, 1906, addressed to the Register and Receiver, Cass Lake, Minnesota, in the matter of John E. C. Robinson, assignee of Justus F. Heath, marked Complainants' Ex. No. 15

16. Copy of Final Certificate No. 715, dated U. S. Land Office, Cass Lake, Minnesota, March 2, 1906, issued to John E. C. Robinson, assignee of Justus F. Heath, marked Complainants' Ex. No. 16.

17. Copy of decision of the Commissioner of the General Land Office, dated June 14, 1906, addressed to the Register and Receiver, Cass Lake, Minnesota, in the matter of John E. C. Robinson, assignee of James Carroll, and of said Robinson, assignee of Justus F. Heath, marked Complainants' Ex. No. 17.

18. Copy of decision of the Secretary of the Interior upon appeal dated February 25, 1907, in the matter of John E. C. Rob-
34 inson, assignee of Justus F. Heath, and the Santa Fe Pacific Railroad Co., marked Complainants' Ex. No. 18.

19. Copy of decision of the Secretary of the Interior, dated May 13, 1907, upon motion for review in matter of John E. C. Robinson, assignee of Justus F. Heath, and the Santa Fe Pacific Railroad Co., marked Complainants' Ex. No. 19.

20. Copy of letter of the Assistant Commissioner of the General Land Office, dated May 18, 1907, addressed to the Register and Receiver, Cass Lake, Minnesota, in the matter of John E. C. Robinson, assignee of Justus F. Heath, B. C. Finnigan, transferee, vs. Santa Fe Pacific R. R. Co., by John E. Lundrigan, Attorney in Fact, marked Complainants' Ex. No. 20.

21. Copy of decision of the acting Secretary of the Interior upon petition for re-review, dated July 18, 1907, in the matter of John

E. C. Robinson, assignee of Justus F. Heath, Santa Fe Pacific Railroad Co., marked Complainants' Ex. No. 21.

All of said exhibits from Number 3 to Number 21, inclusive being attached to and certified under, one certificate dated Dec. 28, 1908, by the Recorder of the General Land Office, except Exhibit No. 11*a*, 11*b*, and 11*c*, which it is hereby stipulated and agreed may be received in evidence to the same effect, and with the same force as though attached to said certificate and certified to by the Recorder of the General Land Office.

22. Copy of patent issued to the Santa Fe Pacific R. R. Co., for S. W. ¼-S. E. ¼, Sec. 13, Tp. 55 N., R. 26 W., 4th P. M. Minnesota, certified to by the Recorder of the General Land Office December 28, 1908, marked Complainants' Ex. No. 22.

23. Copy of decision of the Commissioner of the General Land Office, dated July 19, 1905, in the matter of Maginnis, assignee of Davis, marked Complainants' Ex. No. 23.

24. Copy of decision of the Secretary of the Interior dated March 26, 1906, in the matter of the Northern Pacific Railway Co. vs. Maginnis, assignee of Davis, marked Complainants' Ex. No. 24.

25. Copy of the decision of the Secretary of the Interior on motion for review in case of Northern Pacific Railway Company vs. Maginnis, assignee of Davis, dated June 18, 1906, marked Complainants' Ex. No. 25.

26. Copy of decision of the Secretary of the Interior on petition for re-review, in the matter of Northern Pacific Railway Co., vs. Maginnis, assignee of Davis, dated September 7, 1906, marked Complainants' Ex. No. 26.

27. Copy of decision of the Secretary of the Interior in the matter of John C. Ferguson, dated October 14, 1904, marked Complainants' Ex. No. 27.

28. Copy of instructions of February 8, 1905, of the Commissioner of the General Land Office to the Register and Receiver, Duluth, Minnesota, relative to application to make entry of land embraced in prior Soldiers' Additional homestead applications, marked Complainants' Ex. No. 28.

29. Application of Santa Fe Pacific Railroad Company to select under Act of June 4, 1897, the S. W. ¼ S. E. ¼, Sec. 13, T. 55 N., R. 26 W., Cass Lake District, Minnesota, filed at said Cass Lake Land Office, July 11, 1905, with attached certificate of the Register of said Land Office dated February 25, 1908, marked Complainants' Ex. No. 29.

30. Power of Attorney from said Santa Fe Pacific Railroad Co., to J. E. Lundrigan, executed October 25, 1904, to select land to the extent of forty acres under Act of June 4, 1897, marked Complainants' Ex. No. 30.

Said Exhibits, numbers 23 to 30 inclusive, being attached to and certified under, a certificate of the Recorder of the General Land Office, dated December 28, 1908.

Description of Tract				
Part of Section	Section	Township	Range	Acres
~~Hd. S. W. S. E.~~	13	55	26	40
~~Home S. W. S. E.~~	"	"	"	40
SW SE S. A. Appl of	John E. C.	Robinson,	Assignee J	ames C
SW¼ SE¼	13	55	26	40
~~SW¼ SE¼~~	13	55	26	40

Endorsed:
Filed April 13th, 1909
Henry D. Lang, Clerk
By E. Catherine Neff, Deputy Clerk.

Range No. District of

Names of Purchaser	Date of Sale	Number of Receipt and Certificate Purchase	To Whom Patented	Date of Patent	Where Recorded	
					Volume	Page
Sven Neelson						
Frank Werle	Sept 6" 1900	21588	St.C.Sec 6 Act Mch 2"/89	Addl to Hd 15347-S.15-55-26-Can.by reiqt.	Jan 7-118763-1901	
	Dec 28" 1899	15020	St C. Can for Expiration	May 1" 1900		
	"P" Mar 23, 1904 #698 "P" May	14, 1904	#832 "P" Jany 28, 1905 #1663	"P" Apl. 12, 1905 #1913 P	Aug 29,1905 #221	8-Rejected & closed
			2318 Rejected 3-2-06 Appeal	to G.L.O. 4,16,06-Reply to	G. L. O. 5.9.06	#3262 #3741 #3903
Santa Fe Pacific Railroad Company	July 11, 1905	L.S.18923	J.E.Lundrigan Atty in fact(Subject to S. A. Apo)	July 20, 1908	#4633	
			2318-#3262 #3741 #4083			
John E. C. Robinson Assignee Justus F. Heath	Oct 4, 1905	H.E 927 F.C.715 Mch 2.1906	To G.L.O. 10.4.05, #2921	Canceled May 21st 1907 by	R of May 18,1907	#3903

CERTIFICATE.

I, Lester Bartlett, Register of the United States Land Office, at Cass Lake, Minnesota, do hereby certify that I have carefully compared the foregoing copy of the record of the entries and applications involving the SW1/4SE1/4, Sec. 13, T. 55 N., R. 26 W., 4th P. M., as shown upon the tractbooks in said office, with said original tractbook, and that the same is a true and correct transcript of said original tract book, so far as the same applies to entries and applications affecting said land.

LESTER BARTLETT
Register.

Dated January 9, 1909.

On the part of defendants:

Exhibits H and I, attached to Defendants' Answer.

Exhibit J, being Circular of the General Land Office, of February 18, 1890.

Exhibit K, being Circular of the General Land Office, of December 4, 1896.

Exhibit L, being Circular of the General Land Office, of October 16, 1894.

It is further stipulated and agreed that objections to the evidence offered by either party on the ground of immateriality or irrelevancy is not hereby waived, *for* purpose of this stipulation being to submit the case upon the documentary evidence specified, without question as to the sufficiency of its authentication or objection on the ground of insufficient certification, but subject to all objections as to its relevancy or materiality.

C. D. O'BRIEN AND
P. H. SEYMOUR,
Solicitors and of Counsel with Complainant.
WM. E. CULKIN AND
L. C. HARRIS,
Solicitors for and of Counsel with Defendants.

36 Endorsed: Stipulation as to hearing and Exhibits to be filed. Filed April 13th, 1909, Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

That on the same day, to-wit, the 13th day of April A. D. 1909, there was filed with said Clerk the exhibits of Complainants and Defendants, in the words and figures following, to-wit:

(Here follows paster marked pages 37 and 38.)

39 COMPLAINANTS' EX. No. 2.

M. L. 207,788-B.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *Dec.* 29, 1908.

In replying refer to the above letter number. E. F. W.
Address only the Commissioner of the General Land Office.

Mr. P. H. Seymour, 514 Manhattan Building, Duluth, Minnesota.

SIR: In reply to your letter of Dec. 11th, inclosing $50.00 for certified copies of patent and papers mentioned in your letter of Dec. 7th, you are advised that the second item mentioned in your letter of Dec. 7th, "Application of John E. C. Robinson, assignee of Carroll—to enter said described tract; made January 24, 1901," appears to have been mislaid and cannot be found with the papers in the case. The search for this missing application will be continued, and if found, you will be further advised.

Certified copies of the balance of the papers requested have been prepared and will be forwarded under separate cover.

Respectfully,

S. V. PRONDFIT,
Assistant Commissioner.

E. F. W.

Endorsed: Filed April 13th, 1909. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

207,788.

B.

Del.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *December* 28, 1908.

I hereby certify that the annexed copies of papers are true and literal exemplifications from the originals and press copy books in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. General Land Office.]

H. W. LAMPORT,
Recorder of the General Land Office.

40 COMPLAINANTS' EX. No. 3.

C.

Copy.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *March* 23, 1904.

John E. C. Robinson, Assignee of James Carroll.

Soldier's Additional Homestead Application. Held for Rejection.

Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: My letter of July 25, 1901 R. & R. St. Cloud, Minn. you transmitted the application of John E. C. Robinson, assignee of James Carroll to enter under Sec. 2306 R. S., S. W. ¼ S. E. ¼ Sec. 13, T. 55 N., R. 26 W. 4th Principal Mer., containing 40 acres, based on service in the Army of the United States for not less than ninety days during the civil war, as shown by the records of the War Department, and H. E. No. 2657 made at East Saginaw, Mich. November 9, 1871, by James Carroll for S. E. ¼ S. W. ¼, Sec. 24, T. 13 N., R. 1 W., containing 40 acres, which was canceled Feb. 28, 1877, for abandonment as shown by the records of this office.

The signature of James Carroll to the original entry papers is by mark, whereas a tracing of the signature of James Carroll to the pay rolls of the regiment in which the military service is alleged to have been performed shows it to have been written. The assignor signed his assignment and affidavits in writing and alleged that since making his original entry he had learned to write. As the original entry, however, was made after the soldier had received his discharge from the military service of the United States, the explanation of the discrepancy is not satisfactory.

In view of these discrepancies, it does not appear that the soldier and the original entry are one and the same person.

You will, therefore, notify the applicant that he will be allowed sixty days from notice within which to show cause, if any exists, why his application should not be rejected, or to appeal therefrom, and that in the event of his failure to take action within the time specified, his application will be rejected without further notice to him from this office.

Serve notice and make report in accordance with circular of March 1, 1900, (29 L. D., 649).

Very respectfully,

F. T. MACEY,
Assistant Commissioner.

B. v. C.
R. C. W.

41 Endorsed: Department of the Interior. Received Oct. 11 1904. 32 L. & R. R. Div. 1004.

COMPLAINANTS' EX. No. 4.

"P" Department of the Interior, K. C. D.
18104 General Land Office,
R. A. G.

WASHINGTON, D. C., *January* 28, 1905.

John E. C. Robinson, Assignee of James Carroll.

Application under Section 2306 R. S., for SW¼ SE¼, Sec. 13, T. 55 N., R. 26 W., 4th P. M.

Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: In reference to the above entitled case, I enclose herewith a copy of departmental decision of December 22, 1904, modifying the decision of this office, dated May 14, 1904, which adhered to a former letter, denied a request for a hearing and held the application for rejection. The Department instructs this office to order a hearing at which the applicant "Robinson, will be allowed to show that James Carroll, the soldier and assignee, is the same person who made the original homestead entry hereinbefore described, and upon the testimony thus submitted, the case will be adjudicated in the regular way. If Robinson fails to produce testimony as aforesaid his application will be rejected."

Notify the applicant of the said Departmental decision and that a hearing is hereby ordered. You will confer with Special Agent S. J. Colter of Duluth, Minnesota, as to the date for the hearing and notify the applicant of the date fixed, otherwise proceeding in accordance with the instructions of the said decision.

Resident counsel for the applicant has been advised hereof. The papers in the case are enclosed.

Very respectfully,

W. A. RICHARDS,
Commissioner.

M. E. L.

COMPLAINANTS' EX. No. 5.

Department of the Interior.
United States Land Office.

CASS LAKE, MINNESOTA, *May* 22, 1905.

42 John E. C. Robinson, Assignee of James Carroll.

Application under Section 2306 R. S., for SW¼ SE¼, Sec. 13, T. 55, R. 26, 4th P. M.

Mr. John E. C. Robinson, St. Cloud, Minn.

SIR: In accordance with the Departmental decision of Dec. 22, 1904, (Copies enclosed), in the above described matter.

It is Hereby Ordered that you appear, respond, and offer evidence touching the matters therein set forth before the Register and Receiver of the United States Land Office at Cass Lake, Minn., at ten o'clock A. M. on June 29, 1905.

(Reference is had also to Commissioner's letter "P" of Jan. 28, 1905, and "P" of April 12, 1905, copies herewith).

Respectfully,

M. N. KNOLL,
Receiver.

Enc.

Endorsed: U. S. General Land Office, Received Aug. 3, 1906. 123198.

COMPLAINANTS' EX. No. 6.

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

Postmark of Delivering Office
Saint Cloud, Minn.
May 23, 8:30 A. M.
1905.
and date of Delivery.

Post Office Department.
Official Business.
Penalty of $300 for private use.
Return to:
Name of Sender U. S. Land Office,
Street and Number,
or Post Office Box.
Cass Lake, Minn.

Registry Return Receipt. Form No. 1548.

Received from the Postmaster at St. Cloud, Minn.
(Delivering Office.)
Registered Letter No. 831 from Cass Lake, Minn.
(Office of origin.)
43 Addressed to John E. C. Robinson,
(Name of addressee.)
Date May 23, 1905.
(Date of delivery.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

JOHN E. C. ROBINSON.
Signature or Name of (Addressee.)

1913.

A registered article must not be delivered to anyone but the addressee, except upon the addressee's written order.

When the above receipt has been properly signed, it must be postmarked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

COMPLAINANTS' EX. No. 7.

Department of the Interior,
United States Land Office.

CASS LAKE, MINNESOTA, *July* 15, 1905.

John E. C. Robinson, Assignee of James Carroll.

Application to Enter Under Sec. 2306 R. S. SW¼ SE¼, Sec. 13, T. 55 N., R. 26 W. 4th P. M.

By letter "C" of March 23, 1904, the Hon. Commissioner of the General Land Office held for rejection the above described application of John E. C. Robinson, as Assignee of James Carroll.

By letter "P" of Jan. 28, 1905, the Commissioner of the General Land Office directed that a hearing be ordered, at which the applicant

"Robinson, will be allowed to show that James Carroll, the soldier and assignee, is the same person who made the original homestead entry hereinbefore described, upon the testimony thus submitted, the case will be adjusted in the regular way. If Robinson fails to produce testimony as aforesaid, his application will be rejected."

On May 22, 1905, it was ordered by this office that a hearing in said matter be had before the Register and Receiver of the United States Land Office at Cass Lake, Minn., at ten o'clock A. M. of June 29, 1905.

44 On June 29, 1905, Special Agent, S. J. Colter appeared for and in behalf of the government. John E. C. Robinson entirely failed to appear, either personally or otherwise. On the last mentioned date said case was called at ten o'clock A. M. and held open for the space of two hours, at which time Special Agent Colter introduced for consideration in said cause the report of Special Agent Harvey L. Hulburt, rendered on September 26, 1904, together with the assignment and application papers, homestead affidavits, homestead receipts and the affidavits of Joseph Otway and Frank Timmons. John E. C. Robinson having entirely defaulted at said hearing, we find that James Carroll, the Assignor, who made H. E. No. 2657 at East Saginaw, Michigan, on November 9, 1871, for the SE¼ NW¼ Sec. 24, T. 13 N., R. 1 W., was not the same James Carroll who served in Company "G", 25th Reg't of Infantry, N. Y. Militia; that the Assignor, James Carroll, never performed military service in the Army, Navy or Marine Corps of the United States during the war of the Rebellion. We further find that all the charges contained in the report of Special Agent, Harvey L. Hulburt are true.

We recommend the rejection of the application of John E. C. Robinson to enter the lands in the caption hereof described.

E. S. OAKLEY,
Register.

M. N. KOLL,
Receiver.

Endorsed: U. S. General Land Office, Received Aug. 3, 1905. 123198.

COMPLAINANTS' EX. No. 8.

CASS LAKE, MINN., *July* 15, 1905.

John E. C. Robinson, Assignee of James Carroll.

Application to Enter under Sec. 2306, R. S., SW¼ SE¼, Sec. 13, T. 55 N., R. 25 W., 4th P. M.

John E. C. Robinson, Esq., St. Cloud, Minn.

SIR: Enclosed herewith you will find a copy of the decision and recommendation of this office in the above entitled matter, by which decision we recommend the rejection of your application for the above described land.

45 You are hereby notified that you will be allowed 30 days within which to appeal from the decision of this office, to the Commissioner of the General Land Office, at Washington, D. C.

Respectfully,

E. S. OAKLEY,
Register.

Enc.

COMPLAINANTS' EX. No. 9.

Registry Return Receipt. Form No. 1548.

Received from the Postmaster at St. Cloud, Minn.
(Delivering office.)
Registered Letter No. 1083, from Cass Lake, Minn.
(Office of origin).
Addressed to John E. C. Robinson.
(Name of addressee.)
Date Jul. 17, 1905.
(Date of delivery).

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

J. E. C. ROBINSON.
(Signature or Name of Addressee).

1913. A registered article must not be delivered to any one but the addressee, except upon the addressee's written order. When the above receipt has been properly signed, it must be postmarked

with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

Postmark of Delivering Office,
Saint Cloud, Minn.
Jul. 17
2 P. M. 1905.
and date of Delivery.

Post Office Department.
Official Business.
Penalty of $300 for private use.
Return to: Name of Sender U. S. Land Office,
46 Street and Number,
or Post Office Box.
Cass Lake, Minn.

COMPLAINANTS' EX. No. 10.

Department of the Interior,
United States Land Office,
Cass Lake, Minnesota.

John R. C. Robinson, Assignee of James Carroll.

In re SW¼ SE¼, Sec. 13, Tp. 55, R. 26, 4th P. M.

Now comes the Assignee, John E. C. Robinson, and appeals to the Honorable Commissioner of the General Land Office from the decision of the Honorable Register and Receiver of the local office rendered by said office on the 15th instant, and cancelling the entry of said assignee for the above described land, for the reason that said assignee defaulted at the hearing set for the 29th day of June for the purpose of hearing and determining the validity of said entry. The assignee respectfully shows and alleges that shortly prior to said 29th day of June, and for some days after appellant's mother, who is very aged, was taken seriously ill and required the care and attention of appellant; that at the time of said illness she was absent from St. Cloud, at Osseo, Minnesota; that there was no one to see, care and provide for her but appellant; that it was imperative to bring her back to St. Cloud where she could have proper care and attention; that appellant went to Osseo about the date of the hearing in the performance of the above mentioned duties, and for this reason it was not possible for him to be present at said hearing; That the aforesaid illness came about so suddenly that appellant had not the time and could not secure representation at said hearing. Appellant has no desire to incommode the department, but on the con-

trary, is ready and willing to aid and assist in the settlement and adjustment of all matters in which appellant may be interested. Appellant is deeply sensible and appreciates the seriousness of defaulting at said hearing, and does not ask that the case be reopened.

This appeal is not taken for the purpose of hindering or delaying the adjustment of long drawn out matters, but with the hope, and urgent request, that under the circumstances, appellant be given thirty days within which to reecript said above mentioned tract That in justice and equity, and under the circumstances appellant feels that this request is not extravagant, and therefore, most respectfully asks that the decision of the Honorable Register and Receiver of the local office be amended so as to grant appellant
47 a reasonable time within which to perfect said entry.

Respectfully submitted,

JOHN E. C. ROBINSON.

Dated July 25, 1905.

Received
July 27, 1905.
U. S. Land Office,
Cass Lake.

Endorsed: In Re. SW¼ SE¼ 13 55 26. Appeal to Hon. Com. Gen. Land Office from the decision of the local office. John E. C. Robinson assignee of James Carroll. Filed in U. S. Land Office July 27, 1905. Cass Lake, Minn. U. S. General Land Office received Aug. 3, 1905. 123198.

COMPLAINANTS' EX. 11-*a*.

T. L. G. P. 207788.
J. D. Y.
"P" Department of the Interior, J. V. W.
File 18104 General Land Office.
B. A. G.

WASHINGTON, D. C., *August* 29, 1905.

W. J. M.

Application Under Sec. 2306 R. S. for SW¼ SE¼, Sec. 13, T. 55 N., R. 26 W. 4th P. M. Rejected and closed. Substitution Allowed.

John E. C. Robinson, Assignee of James Carroll

Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: January 28, 1905, this office promulgated the departmental decision in the above entitled case of December 22, 1904, which [modified] the decision of this office of May 14, 1904, which adhered to a former letter, denied a request for a hearing and held the application for rejection. The department instructed this office

to order a hearing in the case, which order was made by said letter. And in response to your inquiry whether the burden of proof in the case vests upon Robinson, stating that it appears from the order of the department that the burden of proof rests upon him, you were advised by my letter of April 12, 1905, that your view appears to be correct.

COMPLAINANTS' EX. 11-*b*.

By your letter of July 31, 1905, you make report and transmit all papers in the case. From the record it appears that the
48 claimant was notified by registered mail sent May 22, 1905, which he received May 23, 1905, as shown by the registry return receipt of the said departmental decision and of the said letter of this office, and that the hearing in the case had been set for ten o'clock A. M., June 29, 1905, at your office, in accordance with the departmental order and my letter.

July 15, 1905, you rendered your joint decision recommending the rejection of the application, it being stated among other things that special agent, S. J. Colter appeared in behalf of the government and submitted certain evidence, but that the applicant, John E. C. Robinson, wholly failed to appear in person or otherwise at the hearing.

That claimant was duly notified of your said decision from which he has appealed within the time allowed. The appellant "does not ask that the case be reopened", stating he takes this appeal not for the purpose of delaying the case, but with the hope that he will be granted thirty days in which to locate new script on the tract and therefore merely asks that your decision be so modified as to grant him time within which to perfect said entry. This request is put on the ground that he defaulted at the hearing because of the sudden illness of his aged mother who required his personal care and attention and whose

COMPLAINANTS' EX. 11-*c*.

sickness came upon her too suddenly to permit of his securing proper representation at the hearing.

Your said decision is accordingly affirmed and the said application is rejected and the case closed. You will so note on your records. You will also notify the applicant that he will be allowed thirty days from notice hereof in which to file a proper substitute for the right hereby rejected, and, if at the expiration of the said period the applicant has not filed such substitute, you are directed to hold the said tract subject to entry from that time by the first qualified applicant.

Very respectfully,

J. H. FIMPLE,
Acting Commissioner.

F.L.R.

COMPLAINANTS' EX. 12. M.E.W

CASS LAKE, MINN., *Sept.* 5, 1905.

John E. C. Robinson, Assignee of James Carroll.

Application to Enter Under Sec. 2306 R. S. the SW¼ SE¼, Sec. 13, T. 55 R. 26.

49 John E. C. Robinson, Esq., St. Cloud, Minn.

SIR: The Commissioner of the General Land Office, by his letter "P" of August 29, 1905, rejected your above described script application and finally closed said case, as fully appears by a copy of said Commissioner's letter, which is enclosed herewith.

You are further notified that you will be allowed 30 days from notice within which to file a paper substitute for the right above described and rejected.

Respectfully,

E. S. OAKLEY,
Register.

Enc.

COMPLAINANTS' EX. 13.

This card must be neatly and correctly made up and addressed at the post office where the article is registered.

The postmaster who delivers the registered article must see that this card is properly signed, postmarked, and mailed to the sender.

Postmark of Delivering Office
Saint Cloud, Minn.
Dep 6, 3 P. M.
1905
and date of delivery.

Post Office Department.
Official Business.
Penalty of $300 for private use.
Return to: Name of Sender. U. S. Land Office.
Street and Number,
or Post Office Box.

Cass Lake, Minn.

Registry Return Receipt. Form No. 1548.

Received from the Postmaster at St. Cloud, Minn.
(Delivering office.)
Registered letter No. 141 from Cass Lake, Minn.
(Office of origin.)
Addressed to J. E. C. Robinson.
(name of addressee.)
Date Sept. 6-1905,
(Date of delivery.)

When delivery is made to an agent of the addressee, both addressee's name and agent's signature must appear in this receipt.

J. E. C. ROBINSON,
(Signature or name of addressee.)

50 A registered article must not be delivered to anyone but the addressee, except upon the addressee's written order.

When the above receipt has been properly signed, it must be post-marked with name of delivering office and actual date of delivery and mailed to its address, without envelope or postage.

COMPLAINANTS' EX. No. 14.

T. 207788.
10

Filed in U. S. Land Office, Oct. 4, 1905, 9 A. M. Lake, Minn.

Additional Homestead Entry.

Under Sec. 2306, U. S. Rev. Stat.

No. —.

Application.

I, John E. C. Robinson, of St. Cloud, County of Stearns, State of Minnesota, the legal assignee of Justus F. Heath, a beneficiary under Section 2306, Revised Statutes of the United States, granting additional lands to soldiers and sailors who served in the Army or Navy of the United States during the war of the rebellion, do hereby apply to enter the SW¼ SE¼, Sec. 13, T., 55, R. 26, P. M. containing — acres, as additional to his homestead on the N½ NW Sec. 24 T. 90, R. 34, P. M., containing eighty acres, entered at Sioux City, Iowa, per H. E. No. 1308 dated April 5, 1860, 19-.

JOHN E. C. ROBINSON,
Assignee of Justus F. Heath.

I, E. S. Oakley, Register of the United States Land Office at Cass Lake, Minn., do hereby certify that John E. C. Robinson, assignee of Justus F. Heath, filed the above application before me this 4 day of October, 1905, for the tract therein described, and that there is no prior adverse right to the same according to Commissioner's letter "P" of Feb'y 15/06.

E. S. OAKLEY, *Register.*

I hereby certify that the hereto attached assignment of additional homestead under Section 2306, Revised Statutes, was this day received from —— —— with application to enter the same on — Sec. — T. —, R. — P. M., that the same might be noted upon the tract books and further action thereon suspended awaiting instructions from the Commissioner; that the fee and commissions
51 are tendered in full. See letter February 18, 1890, circular January 25, 1904, page 238.

—— ——,
Receiver.

COMPLAINANTS' EX. No. 15.

P
File 31358
B. A. G.
J. D. Y.

Department of the Interior,
General Land Office,

J. V. W.
G. F. P.

WASHINGTON, D. C., *Feb.* 15, 1906.

John E. C. Robinson, Assignee of Justus F. Heath.

Soldiers' additional homestead application Allowed.

Register and Receiver, Cass Lake, Minn.

GENTLEMEN: By letter of October 4, 1905, you transmitted the application of John E. C. Robinson, assignee of Justus F. Heath to enter under Sec. 2306 R. S., the SW¼ SE¼, Sec. 13, T. 55 N., R. 26 W 4th P. Mer. containing 40 acres, based on service in the Army of the United States for not less than ninety days during the civil war, as shown by the records of the War Department, and H. E. No. 1308 made at Sioux City, Iowa, March 22, 1869, by Justus F. Heath for W½ NW¼, Sec. 24, T. 90 N. R. 34 W, containing 80 acres, which was cancelled on relinquishment, March 12, 1870, as shown by the records of this office

This application is a substitute for another for the same land which has been finally closed.

The application has been considered, and I find from the evidence submitted and from the records and files of this office pertaining thereto, that Justus F. Heath, was entitled to a soldier's additional homestead right for 80 acres under Sec. 2306 R. S., that 40 acres thereof have been located on SE¼ SE¼, Sec. 7, T. 34 N., R. 16 E., M. Mer., Great Falls Mont., and that the remaining 40 acres have been duly transferred for value, from him to John E. C. Robinson, who seems qualified to locate it on the tract applied for.

The application, with its accompanying papers, is herewith returned with direction that on payment of the legal fee and commissions within sixty days from service of notice hereof, you will allow the entry in the name of John E. C. Robinson, assignee
52 of Justus F. Heath, and issue the original and final receipts and final certificate.

Serve notice and make report in accordance with circular of March 1, 1900 (29 L. D., 649).

Very respectfully,

W. A. RICHARDS, *Commissioner.*

COMPLAINANTS' EX. No. 16.

Final Certificate. Homestead. Application No. 927.

No. 715.

Department of the Interior,
United States Land Office,

CASS LAKE, MINN., *March* 2, 1906.

It is hereby Certified That, pursuant to the provisions of Section No. 2291, Revised Statutes of the United States, John E. C. Robinson, assignee of Justus F. Heath, has made payment in full for SW¼ SE¼, Sec. 2306 R. S. Add'l. to H. E. 1308 Sioux City, Ia. Com. Letter "P" Feb. 15, 1906, of Section No. 13, in Township No. 55 N., of Range No. 26 W., of the 4th Principal Meridian Minn., containing 40 — /100 acres.

Now, Therefore, Be it Known, That on presentation of this certificate to the Commissioner of the General Land Office, the said John E. C. Robinson shall be entitled to a patent for the tract of land above described.

E. S. OAKLEY,
Register.

Endorsed: 13858. Noted on Iowa T. B. vol. 42/116. Final Certificate No. 715 E. H. H. Homestead Application No. 927. Land Office at — March 2, 1906. Sec. 13, Town 55, Range 26 Referred to Div. "D". Department of the Interior Received Aug. 1, 1906. Cass Lake, Minn. 907. Canceled May 18, 1907, by letter "R" F. C. Austin, Clerk. Noted H. L. K. Div. "C" Division R

COMPLAINANTS' EX. No 17.

JDY
JVW

Department of the Interior,
General Land Office.

"P"
File 31358.
B. A. G.

WASHINGTON, D. C., *June* 14, 1906.

WJM
53 Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: March 23, 1904, the applicant, John E. C. Robinson, who, as assignee of James Carroll, had applied to enter under Sec. 2306 R. S., the SW¼ SE¼, Sec. 13, T. 55 N., R. 26 W., 4th P. M., was ruled to show cause why his application should not be rejected subject to the right of appeal for the reason it does not satisfactorily appear that the soldier-assignor is the person who made the original entry on which the application, which was filed in January 1901, is based. A hearing having been ordered at the applicant's request and held at which applicant defaulted, you rendered your joint decision recommending the rejection of the

application from which he appealed to this office. Your action was affirmed August 29, 1905. He stated in his appeal that he did "not ask that the case be reopened", that he had not taken the appeal for the purpose of delay, but with the hope of being granted thirty days in which to locate new scrip which time for that purpose he requested. Your action was affirmed and the application was rejected, that action, in view of the request, being made final, and the applicant allowed thirty days from notice in which to file a proper substitute for the invalid right. In accordance with that decision Robinson failed as a substitute the right of Justus F. Heath on October 4, 1905.

February 15, 1906, the Heath right having been found valid, you were directed by this office to allow Robinson to make the entry. On his compliance with the terms of that decision on March 2, 1906, you issued H. E. No. 927 and F. C. No. 715 to him as such assignee for the said tract.

July 11, 1905, you received and held the application of the Santa Fe Pacific Railroad Company by J. E. Lundrigan, attorney-in-fact, to select under the act of June 4, 1897, the same tract in lieu of Lot 1 of Sec. 7, T. 19 N., R. 2 E. G. & S. R. Mer., in the San Francisco Mountains Forest Reserve, and which you rejected subject to the right of appeal March 2, 1906, the same day you issued the said entry papers to Robinson, for the reason that the selection is in conflict with Robinson's said entry.

March 31, 1906, the selector filed an appeal from your said decision, which you transmitted together with the record. May 9, 1906, you transmitted a motion to dismiss the appeal made in behalf of Robinson.

It will be observed that at the date this office allowed Robinson time in which to file a substitute and when the substitute was filed the application to make a lieu selection had been offered,
54 received and held junior to Robinson's application. In the case of the Northern Pacific Railway Co., vs. Charles P. Maginnis assignee of William D. Davis, the Department held in its decision of March 26, 1906, unreported, the facts being substantially the same as in this case, that a substitution could not be allowed in the face of the intervening adverse right of the railway company. Maginnis' application in that case was made under Sec. 2306 R. S., and it was stated that while it was pending it barred the allowance of another claim for the same land, and hence that the preferred selection of the railway company was rightly held to await final action thereon, but that when the first application failed, the selection took precedence over the second application filed by Maginnis after such selection had been received.

As the base for the lieu selection appears to be valid, Robinson's entry in view of the decision cited was erroneously allowed. You will notify him that his entry is hereby held for cancellation and that he will be allowed sixty days from service of notice hereof to appeal herefrom, and that in the event of default therein, his entry will be cancelled without further notice to him from this office.

In case the action hereby taken shall become final your action

on the selection will be reversed and the selection allowed. Notify the selector hereof.

Serve notice and make report in accordance with circular of March 1, 1900 (29 L. D., 649).

Very respectfully,

G. F. POLLOCK.
Acting Commissioner.

L. J. B.

COMPLAINANTS' EX. No. 18.

Department of the Interior,
Washington.

D. C. H.
E. O. P.
S. V. P.

35-907
F. L. C.

FEBRUARY 25, 1907.

John E. C. Robinson, Assignee of Justus F. Heath, Santa Fe Pacific Railroad Co.

The Commissioner of the General Land Office.

SIR: John E. C. Robinson has appealed to the Department from your office decision of June 14, 1906, holding for cancellation his entry, made March 2, 1906, under the provisions of section 2306, Revised Statutes, of the SW.¼ SE.¼, Sec. 13, T. 55 N., R. 26 W., 4th p. m., Cass Lake land district, Minnesota. The right claimed by Robinson is based upon original homestead entry made by Justus F. Heath, April 5, 1869, of the N½ NW¼, Sec. 24, T. 90, R. 34, Sioux City, Iowa, and upon the requisite military service of the latter.

55

January 24, 1901, Robinson, claiming as assignee of James Carroll, filed similar application for the tract described, March 23, 1904, your office called upon Robinson to show cause why said application should not be rejected. A hearing was ordered at applicant's request in order that he might establish the validity of the right claimed by him as assignee of Carroll. Robinson made default and your office, August 29, 1905, affirmed the recommendation of the local officers and rejected said application, with leave to the applicant to substitute a valid right for the one rejected, and in accordance with the direction of your office Robinson filed with the local officers substituted application based upon the right of Heath. Prior to the filing of the latter application, the Santa Fe Pacific Railroad Company by J. E. Lundrigan, attorney-in-fact, filed application to select said tract under the provisions of the act of June 4, 1897 (30 Stat., 36), in lieu of lot 1, Sec. 7, T. 19 N., R. 2 E., G. and S. R. M., in the San Francisco Mountains forest reserve, which application was received and held by the local officers subject to the right of Robinson until March 2, 1906, the date the latter's substituted application was allowed, when it was rejected. It is from the decisions of your office

reversing the action of the local officers and holding the right of Robinson under his substituted application subject to the right of the railroad company the pending appeal is taken.

A distinction is attempted to be drawn by counsel for appellant between the facts presented in the case at bar and those presented in the case of Northern Pacific Railway Company v. Charles P. Maginnis (unreported), decided by the Department March 26, 1906, in this, that the first application of Maginnis had been prosecuted to a final determination prior to his offer of substitution while in the present case Robinson stated in his appeal to your office that he did not desire to prosecute the same in the event he was allowed the alternative relief asked namely, the right to substitute a valid right for the one rejected. He asserts therefore that his right under the first application was never prosecuted to final determination as in the Maginnis case and that the allowance of the right of substitution is proper and that his claim thereunder attaches as of the date of the filing of the original application. The Department is clearly
56 of opinion a recognition of the attempted distinction of counsel could only result in the destruction of the principle involved in the Maginnis case, supra. Under the rule announced therein your office was without authority to permit the substitution asked by Robinson in the face of an intervening adverse claim. It is not denied that the application of the railroad company was filed prior to the attempted substitution nor that its acceptance by the local officers when presented was in conformity with the settled practice obtaining in such cases. This practice, as was pointed out in departmental decision in the case of Frederick L. Gilbert et al. (35 L. D., 422), arises out of necessity, because of want of authority of the local officers to pass upon and allow or reject applications of this character, when presented. Robinson can not escape the consequences growing out of his request to substitute a valid for an invalid right. The granting thereof was, in effect, a final determination of his rights under the original application and he is charged with notice of what the record contained at the time such request was made. At that date the application of the railroad company was a matter of record and any rights initiated by Robinson subsequently thereto were subject to those of the railway company under its application. The contention of counsel that the claim of Robinson under his substituted application should attach by relation as of the date of the filing of his original application is the same as the one advanced in the Maginnis case, supra, and denied by the Department. The case under consideration falls within the rule therein laid down, and the decision appealed from must, therefore, be affirmed.

The papers are herewith.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

Endorsed: L. & R. R. Div. Received 36 May 2 1907, 907 Office of A. A. G.

COMPLAINANTS' EX. No. 19.

T. F. C. 715—R—31358
15 S. C. H. E. O. P.
HSB S. V. P.

Department of the Interior,
Washington.

35-907.
G W W MAY 13, 1907.

57 JOHN E. C. ROBINSON, Assignee of Justus F. Heath.

Santa Fe Pacific Railroad Company.

The Commissioner of the General Land Office.

SIR: B. E. Finnegan, transferree of John E. C. Robinson, has filed motion for review of departmental decision of February 25, 1907, (unreported), holding for cancellation the entry of said Robinson allowed under the provisions of Section 2306, Revised Statutes, for the S. W. ¼ S. E. ¼ Sec. 13 T. 55 N. R. 26 W., 4th P. M., Cass Lake land district, Minnesota.

The entry in question was allowed March 2, 1906, on a substituted soldier's additional right and in the face of a [pending] application filed by the Santa Fe Pacific Railroad Company to select said tract under the provisions of the act of June 4, 1897 (30 Stat., 36).

It is claimed that the Department erred in applying to this case the rule followed in the case of Northern Pacific Railway Company v. Charles P. Maginnis, (unreported), decided March 26, 1906.

The cases are in all material respects the same, and the distinction attempted to be drawn by counsel was fully noticed and considered in the decision sought to be reviewed.

It is further contended that rights of the character here involved are prejudiced by the denial of the right of substitution in the fact of an adverse claim and that such action should not be taken as against purchasers of such rights who applied to make entry thereunder prior to the date of decision in the Maginnis case, supra. In the opinion of the Department the equities claimed are not entitled to such consideration.

No right of entry is gained by the filing of an invalid application to enter, and upon the rejection thereof the rights of subsequent applicants attach in the order in which they are asserted. By admitting the right of substitution, irrespective of intervening rights the mere filing of an invalid soldiers' additional application would, in effect, amount to a segregation of the land. The refusal of the Department to adopt such a practice does not prejudice the holder of a valid right. The only value of such right lies in the power of the holder to enter thereunder any land subject thereto at the date of filing his application. This right is not denied in the present case, as the land here involved was subject thereto only in the event there

were no prior adverse claims asserted upon which entry should be allowed. The right itself is not destroyed by refusing to allow entry thereunder of this particular tract. The purchaser still has
58 all that he bargained for, and the mere fact that his purchase may have been made upon a mistaken idea that he would be entitled as a matter of right to exercise it upon a particular tract of land does not [entitled] him to equitable consideration as against the prior, and therefore superior, right of another.

After a most careful consideration of all the matters urged in support of the pending motion, the Department finds no sufficient reason for disturbing the decision complained of, and said motion is accordingly hereby denied.

The papers are herewith returned.

Very respectfully, J. R. GARFIELD, *Secretary.*

Endorsed: General Land Office. May 14, 1907. 83136.

COMPLAINANTS' EX. No. 20.

T. L. M. W. F. C. 715.

Refer in reply to this initial R.
31338.
F. R. A.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *May* 18, 1907.

JOHN E. C. ROBINSON, Assignee of Justus F. Heath; B. C. FINNEGAN, Transferee,
vs.
SANTA FE PACIFIC R. R. Co., by John E. Lundrigan, Att'y-in-Fact.

Involving soldier's additional homestead entry for S. W. ¼ S. E. ¼ Sec. 13, T. 55 N., R. 26 W., F. C. No. 715. Entry canceled, and case closed.

Register and Receiver, Cass Lake, Minnesota.

GENTLEMEN: In reference to the above-entitled case, I inclose herewith a copy of the decision of the Secretary of the Interior, dated May 13, 1907, denying the motion for review of the departmental decision of February 25, 1907, affirming office decision dated June 14, 1906, holding the above entry for cancellation, subject to right of appeal.

Said case is accordingly closed. Notify the parties in interest.

59 The entry of Robinson is canceled. The record shows that B. C. Finnegan is the transferee of John E. C. Robinson.

Respectfully,

FRED DENNETT,
Assistant Commissioner.

F. R. A.

COMPLAINANTS' EX. No. 21.

T. L. M. W. 207,788.

16.

Department of the Interior,
Washington.

M. T. D. C. H. E. O. P.
35-907. S. V. P.
D-169.

JULY 18, 1907.

JOHN E. C. ROBINSON, Assignee of Justus F. Heath, Santa Fe Pacific Railroad Co.

Re-Review.

The Commissioner of the General Land Office.

SIR: The Department has before it motion for re-review of its unreported decision of February 25, 1907, filed on behalf of B. C. Finnegan, transferee of John E. C. Robinson. By the decision complained of motion for review of which was denied May 13, 1907 (decision not reported), the entry of said Robinson, allowed under the provisions of section 2306, Revised Statutes, for the S. W. ¼ S. E. ¼ Sec. 13, T. 55 N., R. 26 W., 4th p. m., Cass Lake land district, Minnesota, was held for cancellation.

The facts upon which the action taken is based are clearly set forth in the decisions heretofore rendered and a restatement of them is unnecessary to a determination of the question presented by the pending motion.

It is insisted by counsel that the substituted application of Robinson was presented prior to the rule announced in departmental decision rendered March 26, 1906, in the case of Charles P. Maginnis (unreported) and was in strict conformity with the practice then prevailing and that the Department is without authority to change the rule to the prejudice of prior applicants.

The case of Germania Iron Co. v. James (89 Fed. Rep. 811), is cited and relied upon to support this contention. In that case the court held that a just and reasonable rule of administration adopted and applied by the Department, became a rule of property
60 and could not be altered to the prejudice of those who had initiated rights under such practice. But the rule contended for by counsel as governing the case under consideration is neither

reasonable or just. Robinson attempted to initiate a right by relying upon the invalid claim of another, and insists that even [through] the Department would be unwarranted in recognizing such claim he should be allowed to perfect the right thus asserted to the prejudice of a valid intervening right, of which he had notice, by the substitution of another and different right.

The simple statement of the facts destroys all the argument in support of such a practice. There is neither reason nor equity in it. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment and of these the first was worthless and prior to the assertion of the second the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted.

After carefully considering the matters advanced in support of the motion for re-review, the Department finds no sufficient ground for entertaining it, and the same is hereby denied.

The papers are herewith.

Very respectfully, GEORGE W. WOODRUFF,
Acting Secretary.

R. W. M. B.
File 31384.
F. R. A.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *May* 18, 1907.

In re JOHN E. C. ROBINSON, Assignee of Justus F. Heath,
vs.
SANTA FE PACIFIC RAILROAD CO., by John E. Lundrigan, Attorney-in-Fact.

Involving S. W. ¼ S. E. ¼ Sec. 13, T. 55 N., R. 26 W., Cass Lake, Minn. F. C. No. 715.

Mr. Homer Guerry, 621 13th St., Washington, D. C.

SIR: Your appearance having been filed in the above-entitled case for applicant Robinson, you are hereby notified that this
61 day departmental decision of May 13, 1907, denying motion for review is promulgated. The entry is canceled and the case closed by letter of this date to the local officers.

Very respectfully, FRED DENNETT,
Assistant Commissioner.

F. R. A.

Endorsed: Complainants' Exs. Nos. 3 to 21. Filed April 13th, 1909. Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

COMPLAINANTS' EX. 22.

207788.
B.
D. E. G.

Department of the Interior,
General Land Office.

WASHINGTON, *December* 28, 1908.

I hereby certify that the annexed copy of patent is a true and literal exemplification from the record in this office.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. Land Office.]

H. W. HANFORD,
Recorder of the General Land Office.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Selection No. 15262.

Whereas, The Santa Fe Pacific Railroad Company, being the owner of a tract of land situated and included within the limits of a public forest reservation, known and officially designated as the San Francisco Mountains Forest Reserve, in Arizona, has, under the provisions of the Act approved June 4, 1897, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety eight, and for other purposes," reconveyed and relinquished the said tract to the United States and has, under the provisions of said Act, selected in lieu thereof the following described tract of vacant public land now open to settlement, to-wit:

The southwest quarter of the southeast quarter of section thirteen in township fifty-five north of range twenty six west of the Fourth Principal Meridian, Minnesota, containing forty acres.

62 Now Know Ye, That the United States of America, In consideration of the premises, Has Given and Granted and by these presents, Does Give and Grant unto the said Santa Fe Pacific Railroad Company, and to its successors, the lands above described; To Have And To Hold the same, together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Santa Fe Pacific Railroad Company, and to its successors and assigns forever.

In Testimony Whereof, I, Theodore Roosevelt, President of the United States of America, have caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand, at the City of Washington, the twentieth

day of July, in the year of our Lord one thousand nine hundred and eight, and of the Independence of the United States the one hundred and thirty-third.

[L. S.] By the President:

THEODORE ROOSEVELT,
By M. W. YOUNG, *Secretary.*

JOHN O'CONNELL,
Recorder of the General Land Office.

Recorded Patent No. 4633.

Endorsed: Complainant's Ex. No. 22. Filed April 13th, 1909. Henry D. Lang, Clerk, By E. Catherine Neff, Deputy Clerk.

207788.
B.
D. E. G.

Department of the Interior,
General Land Office.

WASHINGTON, D. C., *December* 28, 1908.

I hereby certify that the annexed copies of papers are true and literal exemplifications from the originals and press copy books in this office.

In Testimony Whereof I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[Seal U. S. Land Office.]

H. W. SANFORD,
Recorder of the General Land Office.

63 COMPLAINANTS' EX. No. 23.

"P" Department of the Interior, J. D. Y.
16756 General Land Office. E. D. F.
F. R. A.

WASHINGTON, D. C., *July* 19, 1905.

W. J. M.

Register and Receiver, Duluth, Minnesota.

GENTLEMEN: Oct. 25, 1899, Charles P. Maginnis, as assignee of William D. Davis, applied to enter under Sec. 2306, R. S., Lots 1 and 4, Sec. 7, T. 148 N., R. 29 W., basing his application upon alleged military service of said Davis and a certain homestead entry alleged to have been made by said Davis in 1870.

By letter "P" of April 7, 1904, said application was suspended upon an adverse report of a special agent of this office, it being charged that said application was based on insufficient military

service. Applicant was allowed thirty days from service of notice within which to apply for a hearing upon said charges.

Applicant was served with notice of said decision Sept. 1, 1904. No application for a hearing was made within the time allowed and on Jan. 14, 1905, you rendered your joint decision recommending the rejection of said application. Service of notice of your decision was made Jan. 19, 1905, by registered mail, as is evidenced by Registry Return Receipt signed by applicant, per L. O. Baxter, addressee's agent. By letter of April 24, 1905, you transmitted proof of service and other papers in the case and reported that no action had been taken in the matter by applicant.

I am now in receipt of your letter of May 19, 1905, transmitting a request by P. H. Seymour, attorney, on behalf of applicant, for extension of time in which to file a substituted right for the tract applied for in the place of the defective right heretofore presented. It is stated as a reason for the request that the applicant is in Portland, Oregon, and time is necessary in order to secure his signature.

I am in receipt of a communication from the resident counsel of the Northern Pacific Ry. Co., calling the attention to the fact that on April 14, 1905, said company tendered its selection for the tracts involved under act of July 1, 1898, and requesting that the above application for extension of time be denied and the company's list returned to you for allowance.

In the case of Robeson T. White, 30 L. D. 61, it is held in effect that an applicant under Sec. 2306 R. S., after due notice that a soldier's additional homestead right, upon which his application is based, is for any reason illegal or invalid, may substitute another soldier's additional homestead right as a basis for his original application without waiving any rights acquired by virtue of such original application.

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In accordance with the case of Robeson T. White, supra, and the case of John C. Ferguson (Secretary's decision of Oct. 14, 1904 — unreported), the application of Maginnis serves to protect his rights as against other applicants until such time as the case is closed upon the records of this office, and the tender of the selection of the Northern Pacific Ry. Co., for said tract can confer no right upon the company as against this applicant, but serves to protect it against others.

The facts presented as reason for an extension of time in which to file a substituted right are deemed sufficient to warrant granting the request.

You are therefore directed to notify applicant and also his said attorney that he will be allowed thirty days from this date in which to file a substituted right. Resident counsel for the Northern Pacific Ry. Co., have been notified hereof.

In due time make report,

Very respectfully,

W. A. RICHARDS,
Commissioner.

GSB

COMPLAINANTS' EX. No. 24.

Department of the Interior,
Washington.

E. J. H.
F. W. C.
S. V. P.

34-698.
F. L. C.

NORTHERN PACIFIC RAILWAY CO.
vs.
CHARLES P. MAGINNIS, Assignee of WILLIAM D. DAVIS.

The Commissioner of General Land Office.

SIR: November 13, 1899, Charles P. Maginnis, assignee of William D. Davis, filed an application under section 2306 of the Revised Statutes, to make soldiers' additional homestead entry of lots 1 and 4 of section 7, T. 148 N., R. 29 W., Cass Lake, Minnesota land district.

April 7, 1904, said application was suspended by your office upon special agent's report charging that Davis did not render the requisite military service to entitle him to such right, and that gross irregularities were practiced in securing the assignment
65 papers. The applicant was allowed thirty days within which to apply for a hearing.

January 14, 1905, no hearing having been applied for within the time allowed therefor, the local officers rendered decision recommending rejection of said application.

May 19, 1905, counsel for Maginnis filed an application for extension of time within which to file a substituted right in place of the former one which had been suspended by your office.

June 19, 1905, counsel for the Northern Pacific Railway Company filed in your office objection to the granting of such extension of time to Maginnis, upon the ground that said company had, on April 14, 1905, tendered in the local office its selection of the tracts involved under the act of July 1, 1908 (30 Stat., 597, 620), which application had, it appears, been suspended in said office and held to be junior to the application of Maginnis, as assignee of Davis.

July 19, 1905, your office found that the facts presented by Maginnis as ground for an extension of time within which to file a substituted right, were sufficient to warrant the granting of the request, and he was, accordingly, allowed thirty days within which to file the same.

July 25, 1905, the local officers called the attention of your office to the fact that on June 1, 1905, the application of Maginnis to enter the tracts involved, as assignee of John W. Phillips, had been transmitted to your office, as a substitute for his prior application as assignee of Davis.

September 30, 1905, your office decision found that by such act of substitution Maginnis acknowledged the truth of the charges against his application as assignee of Davis, and waived all his

right thereunder, and said application was accordingly rejected. Upon consideration of the substituted application it was found that Phillips was entitled to a soldiers' additional right for 80 acres, and that the same has been duly transferred to Maginnis. Said application was returned to the local officers with direction that the same be allowed upon the payment of the legal fees and commissions. From that decision the railway company has appealed to the Department.

It appears that upon the suspension by your office, on April 7, 1904, of the application of Maginnis, as assignee of Davis, he took no action in the matter, either by applying for a hearing with a view to establishing the validity of said right within the time allowed him therefor, or by the substitution of another right in lieu
66 thereof, until May 19, 1905, more than a year after such suspension, when he filed application for an extension of the time within which to file a substituted right. In the meantime the railway company had, on April 14, 1905, tendered its selection of the land in question.

It also appears that Maginnis, in subsequently tendering his application as assignee of Phillips, specifically acknowledged the truth of the charges of the special agent's report against his application as assignee of Davis and asked to be allowed to make substitution of the Phillips right therefor. Your office decision accordingly rejected said application as assignee of Davis and declared the case closed as to it.

In view of this situation, your office erred in permitting the substitution in question. Such substitution could not be allowed in the face of the intervening adverse right of the railway company.

The original application by Maginnis failed. While it was pending it barred the allowance of another claim for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but, when the first application failed, the selection took precedence over a second application by Maginnis, filed after such selection.

Your office decision is accordingly reversed and said application is rejected.

The papers are herewith returned.

Very respectfully,

THOS. RYAN,
Acting Secretary.

S. V. P.
84-698

COMPLAINANTS' EX. No. 25.

R. J. H.
F. W. C.

Department of the Interior,
Washington.

JUNE 18, 1906.

NORTHERN PACIFIC RAILWAY CO.
v.
CHARLES P. MAGINNIS, Assignee of WILLIAM D. DAVIS.

Motion for Review.

The Commissioner of the General Land Office.

SIR: The above entitled case is before the Department upon a motion filed by Charles P. Maginnis for review of its decision
67 of March 26, 1906, rejecting his application to make soldiers' additional homestead entry for lots 1 and 4, Sec. 7, T. 148 N., R. 29 W., Cass Lake, Minnesota, land district, as assignee of John W. Phillips, in substitution for like application as assignee of William D. Davis, for conflict with the selection of said tracts by the Northern Pacific Railway Company under the act of July 1, 1898 (30 Stat., 397, 620).

It appears that the application of Maginnis, as assignee of Davis, was tendered November 13, 1899, but was suspended April 7, 1904, upon special agent's report charging that Davis did not render the requisite military service to entitle him to such right, and Maginnis was allowed thirty days within which to apply for a hearing; that no hearing having been applied for the local officers, on January 14, 1905, rendered decision recommending the rejection of said application; that on April 14, 1905, the railway company tendered its selection of the tracts hereinbefore shown, which was held awaiting final action upon the application of Maginnis; that subsequently on June 1, 1905, Maginnis tendered a second application as assignee of Phillips, as a substitute for his original application as assignee of Davis.

It is claimed in the motion on behalf of Maginnis, that the Department erred in holding that the application of the railway company to select the land, pending final adjudication of the Maginnis application, gave it any standing as an adverse claimant, or was the initiation of a valid adverse claim.

What the Department held in its decision was, that while the original application of Maginnis was pending, "it barred the allowance of another claim for the same land, and the profered selection by the railway company was rightly held to await final action thereon, but when the first application failed, the selection took precedence over a second application by Maginnis, filed after such selection."

The cases of Jerry Watkins (17 L. D., 148), Robeson T. White (30 L. D., 61), and others, cited in the motion for review in support of the contention made therein, so far as they are in point at all in

this case, appear to sustain the departmental decision, rather than the claim of Maginnis.

Upon careful examination of the case no good ground is disclosed for disturbing the departmental decision complained of. The motion for review is accordingly denied and is herewith returned for the files of your office.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

68 COMPLAINANTS' EX. No. 26.

Department of the Interior,
Washington.

34-698 F W. C.
S. V. P.

F. L. C. SEPTEMBER 7, 1906.

NORTHERN PACIFIC RY. CO.
v.
CHARLES P. MAGINNIS, assignee of WILLIAM D. DAVIS.

Commissioner of the General Land Office.

SIR: With his letter of August 24, last, Honorable Moses E. Clapp, enclosed a petition for rereview, on behalf of Charles P. Maginnis, in the matter of his contest with the Northern Pacific Railway Company, involving lots 1 and 4, Sec. 7, T. 148 N., R. 29 W., Cass Lake land district, Minnesota. This case has twice before received departmental consideration. First in decision of March 26, last, wherein was considered the appeal by the Northern Pacific Railway Company from your office decision of July 19, 1905, allowing Maginnis the right to substitute, in lieu of his soldiers' additional homestead application tendered March 13, 1899 (as assignee of William D. Davis, a like application as assignee of John W. Phillips; said substituted application having been tendered more than a year after the suspension of the first application by your office upon report of a special agent charging that Davis had not rendered the requisite military service to entitle him to a homestead right and after the proffer of a selection of the land by the Northern Pacific Railway Company under the provisions of the act of July 1, 1898 (30 Stat., 597, 620). Said departmental decision reversed the decision of your office, holding that while the original application of Maginnis was pending it barred the allowance of another claim for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but when the first application failed, the selection took precedence over the second application of Maginnis, filed after such selection.

The motion for review of said decision filed on behalf of Maginnis was considered in departmental decision of June 18, last (not reported) wherein said motion was denied.

The facts in the case are fully set forth in these departmental decisions. The petition for rereview alleges nothing but what was fully considered in the previous decisions of this Department, except a certain line of cases passed upon by the Department, involving pending indemnity school land selections. The difference be-
69 tween the two cases is clearly defined in the departmental decisions. An indemnity school land selection, when accepted, and while of record, is held to bar the receipt of any subsequent application until the selection has been [formally] canceled. With regard to soldier's additional homestead application the same is received by the local officers and forwarded without action to the Commissioner of the General Land Office and during its pendency in this condition, that is before it is finally allowed or rejected, other applications for the land applied for may be received and held subject to the final action upon such application.

In the case of ex parte John C. Ferguson, decided by this Department October 13, 1904, it was held:

The Department has uniformly held that an entry of the public lands segregates them and no other disposition can be made thereof so long as that entry is in existence, and therefore that any application to make entry, pending during the existence of the entry, must be rejected and no rights are acquired thereby. Since the case of Stewart v. Petersen (28 L. D., 515), the Department has held that any application presented during the existence of an entry of record must be rejected outright, and that no rights can be recognized as having been acquired by the presentation of an application to enter at such time. But the case at bar is different. There was no entry of the tract described and there is none now. McBean presented an application to enter. It was forwarded to your office for consideration and there rejected. His application was simply tentative and the most that can be held to have — done, as has been often decided, was to protect any rights that he might have against other applicants, or in the words used in the books, it was equivalent to an entry so far as his rights were concerned. Therefore, there is no good reason apparent why the application of Ferguson should not have been held to await that of McBean. As it appears that the latter had no rights, he consequently took nothing by his application, and his appeal from the decision rejecting his application, of course, placed him in no better position. This being so, that application should be no bar to the allowance of the application of Ferguson.

This ruling of the Department was long prior to the proffer of the indemnity selection by the railway company and the substituted application of Maginnis. It clearly outlines the rule of administration in the disposition of soldier's additional homestead applications and all subsequent applications, prior to the allowance of the additional. In the absence of an intervening application there can be no
70 question but that the substitution of another application might be allowed at any time but it cannot be assumed that with the presentation of a soldiers' additional application there is carried a right, in the event the application fails, to substitute another. The subetituted application is in reality a new ap-

plication and no rights are gained thereunder because of any prior application. An intervening application clearly bars the right of substitution, and for that reason the previous decisions of this Department in this case were correct, are adhered to, and the petition for re-review is denied and is herewith enclosed for the files of your office relating to said case.

Very respectfully,

THOS. RYAN,
Acting Secretary.

COMPLAINANTS' EX. NO. 27.

Department of the Interior,
Washington.

32-541.

S. V. P.
V. B.

OCTOBER 14, 1904.

F. L. C.

Ex Parte JOHN C. FERGUSON.

The Commissioner of the General Land Office.

SIR: John C. Ferguson has applied from your office decision of May 3, 1904, wherein you affirmed the action of the local officers in rejecting his application to make homestead entry for the S. W. ¼ N. E. ¼, Sec. 34, T. 59 N., R. 12 W., Duluth, Minnesota land district, because of the conflict with the prior pending soldiers' additional application of Alexander McBean.

It appears from the record that on October 29, 1902, Alexander McBean, as assignee of Ellis, applied to make soldiers' additional homestead entry for the described tract. This application, in accordance with the circular, was forwarded to your office and on November 28, 1903, was rejected by you for the reason that the service of Ellis was insufficient as a basis on which to found such additional right.

Appeal was taken from that decision and on February 29, 1904, it was affirmed here, and apparently there has been no review of said decision asked for.

In the meantime, on January 22, 1904, pending the appeal of McBean, Ferguson presented an application to make homestead entry for said tract. This was rejected by the register and receiver for conflict with the pending application of McBean. Fer-
71 guson appealed and on May 3, 1904, you affirmed the action of the local officers. Your decision gives as authority for this ruling the instructions of your office, dated February 18, 1899, to be found on page 259 of the General Circular of 1899, wherein the register and receiver are directed, upon presentation of an application to make entry under section 2306 of the Revised Statutes, and the right has not been certified, before taking final action on the application, it shall be forwarded to your office for consideration, after

making the necessary notations on their records so as to show the pendency of the application and "consequent segregation of the land, so as to prevent any adverse appropriation before the application is finally acted upon." Thus your office held, in effect, that the application of McBean to make entry, segregated the land: consequently that the local officers could only reject absolutely the application of Ferguson. In his appeal, the latter insists that the application of McBean was not an absolute segregation of the land but only preserved his rights, if he had any, and that his (Ferguson's) application to enter should have been received and retained, subject to the determination of the right of McBean to make entry, and that, inasmuch as it has finally been determined that McBean had no such right, it constitutes no bar to that of the applicant which ought now to be allowed.

The Department has uniformly held that an entry of the public lands segregates them and no other disposition can be made thereof so long as that entry is in existence, and therefore that any application to make entry, pending during the existence of the entry, must be rejected and no rights are acquired thereby. Since the case of Stewart v. Petersen (28 L. D. 515), the Department has held that any application presented during the existence of an entry of record must be rejected outright, and that no rights can be recognized as having been acquired by the presentation of an application to enter at such time. But the case at bar is different. There was no entry of the tract described and there is none now. McBean presented an application to enter. It was forwarded to your office for consideration and there rejected. His application was simply tentative and the most that it can be held to have done, as has been often decided, was to protect any rights that he might have as against other applicants, or in the words used in the books, it was equivalent to an entry only so far as his rights were concerned. Therefore, there is no good reason apparent why the application — Ferguson should not have been held to await that of McBean. As it appears that the latter had no rights, he consequently took nothing by his application, and his appeal from the decision rejecting his application, of course, placed him in no better position. This being so, that application should be no bar to the allowance of the application of Ferguson.

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Entertaining these views, your decision is reversed and the case is returned to you for appropriate action. The departmental decision in this case of September 26, 1904, is recalled and vacated and this decision substituted therefor.

Very respectfully,

E. A. HITCHCOCK,
Secretary.

COMPLAINANTS' EX. No. 28.

"P." Department of the Interior. J. V. W.
25082. General Land Office.

G. F. P. WASHINGTON, D. C., *February* 8, 1905.

Register and Receiver, Duluth, Minnesota.

SIRS: I have your request of November 21, 1904 for instructions as to whether the circular of July 14, 1899 (29 L. D., 29) requiring the rejection of any application or filing while an entry is pending for the same land, applies to soldiers' additional application-; in other words whether they are entries within the meaning of said circular.

Your inquiry is suggested by the Secretary's ruling of October 14, 1904, in the case of soldier's additional application by Alexander McBean, and the subsequent application of William Ferguson offered while the former was pending, promulgated November 4, 1904, wherein this office was reversed, and it was held:

"The most that it can be held to have done, as has been often decided, was to protect any rights that he might have as against other applicants, or in the words used in the books, it was equivalent to an entry only so far as his rights were concerned. Therefore, there is no good reason apparent why the application of Ferguson should not have been held to await that of McBean. As it appears that the latter had no rights, he consequently took nothing by his application, and his appeal from the decision rejecting his application, of course, placed him in no better position. This being so, that application should be no bar to the allowance of the application of Ferguson."

The above ruling in your judgment conflicts with the following quotation of circular letter "R" of November 17, 1904, to the local officers generally.

"Any form of selection, or entry once allowed by the district
73 officers and made of record, except only such entries as by
Act of May 14, 1880 (21 Stat., 140) are authorized to be canceled by the district land officers on relinquishment thereof, operate to appropriate the land covered thereby, and to withhold it from other disposal until notice of its cancellation, issued by this office, has been received and noted of record by the district land officers."

The Secretary distinguishes forest reserve lieu selections from soldiers' additional applications, giving the former the status of entries (33 L. D., 295) while denying that quality to soldiers' additional applications. (Ferguson case supra).

It follows therefore that circular letter "R" must be considered as fixing the status of forest selections while the Secretary's decision, supra, governs in the case of soldiers' additional applications.

With respect to your next question.

"Where a person who has a pending soldier's additional application for a tract of land becomes convinced that the right or "scrip" is bad, applies to substitute another piece of the same kind of scrip,

to wit: soldier's additional, should we receive and transmit such scrip or reject it?"

The answer to this question is provided for in the case of Robeson T. White (30 L. D., 64) where it is held in effect that an applicant under Section 2306 R. S., may after due notice that a soldier's additional right, upon which his application is based, is for any reason illegal or invalid, substitute another soldier's additional application as a basis for his original application without waiving any rights acquired by virtue of such original application.

Referring to your question as to the proper procedure in the case of a relinquishment of a soldier's additional application, after the basis has been declared invalid, and the filing of a new application accompanied by a substituted [bases], I will state the situation as follows:

Where the office holds for rejection an application because of a defective base and the applicant after due notice thereof, wishes to retain his rights under his original application, he need not file a new application (Robeson T. White 30 L. D., 61 supra) but all that is required to preserve his rights under his original application is to file within the time allowed under the rules a substituted basis of the same character as that originally presented which act will be accepted as a waiver by the applicant of all rights asserted under the original basis and be sufficient to warrant you in immediately forwarding said substituted basis to this office after making proper notation upon your records.

The office will thereupon take up this substituted basis and consider it in place of the one theretofore filed. Should, how-
74 ever, the applicant fail to furnish the substituted basis within the time permitted the case is to be closed upon the records of this office and the land will be open to settlement by the first qualified applicant, and all rights acquired under the original application are thereupon concluded.

While the question is not raised the office notices, however, that in some cases applicants seek in lieu of soldiers' additional scrip, which has been found invalid, to substitute another kind of so called scrip to protect the rights under their original applications. There is no decision or ruling known to this office by which any rights obtained under original applications can be maintained by the substitution of any other than scrip of the same character as that upon which the original application was based, and any effort thereafter to substitute [other] scrip before the case is closed should be suspended and forwarded to this office to await final action on the original application as in other cases.

Very respectfully, W. A. RICHARDS,
Commissioner.

A. F. McC.

COMPLAINANTS' EX. No. 29.

Perfected Claims.

Selection in Lieu of Land in San Francisco Mountains Forest Reserve (Act June 4, 1897).

To the Register and Receiver, United States Land Office, Cass Lake, Minn.

GENTLEMEN: The Santa Fe Pacific Railroad Company, is the owner of the following described lands, to-wit:

Lot numbered One of Section Seven, Township nineteen North, Range Two East of Gila and Salt River Base and Meridian, containing forty acres, and respectfully represents that said lands are situated and lying within the boundaries of the San Francisco Mountains Forest Reserve; that said Company desires to relinquish and reconvey said lands unto the United States, and in lieu thereof to select the following described lands, to-wit:

Southwest quarter of Southeast quarter of Section thirteen (13) Township Fifty-five (55) North of Range Twenty-six West of 4th P. M., situated in the Cass Lake Land District, in the State of Minnesota, and containing forty acres, under the provisions of the act of June 4, 1897 (30 Stat., 36).

75 In compliance with the regulations under said act the Santa Fe Pacific Railroad Company has made, executed and caused to be recorded in the proper County and Territory a deed of reconveyance to the United States of the tracts first above described, situated within said San Francisco Mountains Forest Reserve, and in relation thereto has caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the lands relinquished or surrendered are free from any encumbrance of any kind; also that all taxes thereon to the present time have been paid, and an affidavit showing the lands selected to be non-mineral, non-saline in character and unoccupied.

The base lands herein relinquished have not been used as the basis for any other lieu selection.

The Santa Fe Pacific Railroad Company hereby waives and relinquishes all its right to make additional selection of the excess acreage relinquished, if any there be, over the acreage herein selected.

The Santa Fe Pacific Railroad Company therefore asks that a United States patent issue to it for the tract or tracts thus selected.

SANTA FE PACIFIC RAILROAD COMPANY,
By J. E. LUNDRIGAN, *Its Attorney in Fact.*

Received Jul- 11, 1905. U. S. Land Office Cass Lake.

U. S. LAND OFFICE AT CASS LAKE, MINN.

I, E. S. Oakley, Register of the Land Office at Cass Lake, do hereby certify that the land above selected, in lieu of the land herein relin-

quished to the United States, is free from conflict, and that there is no adverse filing, entry or claim thereto shown upon the records of this office.

E. S. OAKLEY,
Register.

Dated Feby. 25, 1908.

Selection approved by the Commissioner of the General Land Office, per letter "R", to Register and Receiver, May 26, 1908. O. D. O. Ex Div. "R."

Endorsed: Application of— Selection approved by Commissioner General Land Office May 26, 1908. O. D. O. Division R.

76 COMPLAINANTS' EX. No. 30.

Power of Attorney.

Know All Men by These Presents:

That the Santa Fe Pacific Railroad Company has made, constituted and appointed, and by these presents does make, constitute and appoint J. E. Lundrigan its true and lawful Agent and Attorney for, and in its name, place and stead to locate and select, either in whole or in part, in any United States Land Office, the full amount or any portion of forty acres of vacant surveyed, non-mineral, public lands, which are subject to homestead entry as provided for by the acts of Congress approved June 4, 1897, and June 6, 1900, to which the undersigned is entitled under the provisions of the acts aforesaid (including the right to waive any excess or to comply with any rule of approximation which the Secretary of the Interior may prescribe) in lieu of and in exchange for the following described lands, to-wit:

Lot numbered one of section seven, township nineteen north, range two east of the Gila and Salt River Base and Meridian, Arizona, in the County of Coconino, Territory of Arizona, containing forty acres, which said land is included within the limits of the San Francisco Mountains Forest Reserve, and has been surrendered by the undersigned to the United States in accordance with the provisions of said acts, and for the purpose of making an exchange for other lands, and that the said relinquished land does not constitute the basis for any other selection made by said Company.

Giving and Granting unto its said Attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully and to all intents and purposes as it might or could do if personally present, hereby ratifying and confirming all that its said Attorney shall or will cause to be done, by virtue of these presents.

In Witness Whereof, It has caused this instrument to be signed

by its President and attested by its Assistant Secretary, and sealed with its common seal, this 25th day of October, 1904.

[SEAL.] SANTA FE PACIFIC RAILROAD COMPANY,
By E. P. RIPLEY, *President.*

77 Attest:
E. WILDER,
Assistant Secretary.

STATE OF ILLINOIS,
County of Cook, ss:

Before me, Edward J. Engel, a Notary Public in and for said County of Cook, State of Illinois, on this day personally appeared E. P. Ripley, known to me to be the President of the Santa Fe Pacific Railroad Company, the corporation that executed the foregoing instrument, and acknowledged to me the execution of said instrument as the free act and deed of such corporation by him voluntarily executed.

Given under my hand and seal of office, this 25th day of October, 1904.

[SEAL.] EDWARD J. ENGEL,
Notary Public in and for said County and State.

My commission expires 17th day of April, A. D. 1905.

STATE OF KANSAS,
County of Shawnee, ss:

Before me, Geo. W. Porter, a Notary Public in and for said County of Shawnee, State of Kansas, on this day personally appeared E. Wilder, known to me to be the Assistant Secretary of the Santa Fe Pacific Railroad Company, the corporation that executed the foregoing instrument, and acknowledged to me the execution of said instrument as the free act and deed of such corporation, by him voluntarily executed.

Given under my hand and seal of office, this 26th day of October, A. D. 1904.

[SEAL.] GEO. W. PORTER,
Notary Public in and for said County and State.

My commission expires 21st day of Jan. 1907.

Power of attorney Santa Fe Pacific Railroad Company to —
Dated Oct. 25, 1904.

Endorsed: Complainants' Exs. Nos. 23, 24, 25, 26, 27, 28, 29 & 30. Filed April 13th, 1909. Henry D. Lang, Clerk. By E. Catherine Neff, Deputy Clerk.

78 DEFENDANTS' EXHIBIT "J."

Soldiers' Additional Entries, Circular February 18, 1890.

Department of the Interior,
General Land Office,

WASHINGTON, D. C. *February* 18, 1890.

Registers and Receivers, United States Land Office.

GENTLEMEN: Where parties apply to make entries under section 2306, United States Revised Statutes, claiming, by virtue of service in the Army or Navy of the United States during the late civil war, and of having made a homestead entry for less than 160 acres, prior to the 22nd of June, 1874, and the right claimed is not certified by this Office, after examination under circular of May 17, 1877, and the certificate presented to you in support of the claim, I have to direct that before taking final action on the claim you forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendency of the application, and the consequent segregation of the land, so as to prevent any appropriation before the application is finally acted upon, and await instructions before taking any further action in the case.

Very respectfully,

LEWIS H. GROFF, *Commissioner.*

Endorsed: Filed May 1st, 1909. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

DEFENDANTS' EXHIBIT "K".

Soldiers' Additional Entries, Circular December 4, 1896, *Referring to Circular February* 18, 1890.

Department of the Interior,
General Land Office.

WASHINGTON, D. C. *December* 4, 1896.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to circular letter of February 18, 1890 (copy herewith), in regard to soldiers' additional homestead entries, the existence of which is in some instances being disregarded or overlooked.

Under said circular you were directed not to allow applications
for soldiers' additional entries under section 2306, Revised
79 Statutes, to go to record when unaccompanied by certificates
issued by the Commissioner of the general land office, certifying the right of the soldier to make additional entry for a specific amount of land.

[You-] attention is also called to the circular of October 16, 1894 (copy herewith), in regard to certificate of right recertified by this office under the act of August 18, 1894 (28 Stat., 397), in the names of assignees of soldiers.

You are authorized to allow an entry to go to record when a certificate in the name of the soldier, or a recertified certificate in the name of the assignee of the soldier, is presented for location. But whenever an application to make additional entry under section 2306, Revised Statutes, not to locate a certificate, is made either by the soldier in person or by his assignee, who must file evidence of the alleged assignment, you will make the necessary notations on your records and transmit the application to this Office for examination with the official records as directed in said letter of February 18, 1890, and await further instructions.

With regard to the location of certificates recertified under the act of August 18, 1894, the present owner thereof must be connected with the soldier. Therefore, in the allowance of such locations final papers must be issued in the name of the present owner of the certificate, the one who applies to locate the same, as assignee of the soldier not of another, whether the name of said present owner appears in the certificate as the immediate assignee of the soldier, or whether his ownership is shown by subsequent assignments.

When a certificate is presented for location which has not been recertified under said act of August 18, 1894, the final papers should be issued in the name of the soldier, whoever may be the owner thereof.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Endorsed: Filed May 1st, 1909. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

DEFENDANTS' EXHIBIT "L."

Soldiers' Additional Homestead—Act of August 18, 1894. *Circular*

Department of the Interior,
General Land Office.

80 WASHINGTON, D. C., *October* 16, 1894.

Registers and Receivers, United States Land Offices:

GENTLEMEN: Your attention is called to the following provision contained in an Act of Congress, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes, "approved August 18, 1894, viz:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office un-

der section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees.

You will observe that all certificates of right, regularly issued by this office, showing that the parties named therein are entitled to make soldiers' additional homestead entries, are declared to be valid by the statute, notwithstanding any attempted sale or transfer, and that, where such certificates have been or may hereafter be, sold or transferred, the sale or transfer thereof shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value, and that all entries made by such purchasers therewith shall be approved, and patent shall issue in the name of the assignees, but before approving such entries for patent, the transferee shall file in this office satisfactory proof of ownership and of bona fide purchase for value.

To enable the assignees of these certificates to exercise in their own names the right of entry confirmed by this statute, it is directed that the certificate itself shall, in each instance, prior to any entry by the assignee, be presented to this office for examination and additional certification covering the fact of assignment. Holders of such certificates desiring to exercise the right of entry in their own names, must file such certificates in this office, together with satisfactory
81 proof of ownership and bona fide purchase for value. If, upon examination, the proof so filed is satisfactory, an additional certificate will be attached to the original authorizing the location thereof, or entry of land therewith, in the name of the assignee or his assigns. You will allow no entries in the names of assignees except upon presentation of such additional certificates issued by this office. When such additional certificates are presented, you will issue homestead papers and the final certificate and receipt, in the name of the transferee, referring to him in said papers as the "Assignee" of the soldier.

You will also observe that this law does not prohibit the location of said certificates, by the holders, as heretofore, either by the soldiers in person or by others acting as attorneys for the soldiers and in the names of the soldiers. Therefore, when application is made to locate such a certificate by the holder in the name of the soldier, you will allow the entry of land under said certificate, if the application papers are regular in all other respects, and issue the homestead papers, and the final certificate, and receipt in the name of the soldier, under

the instructions heretofore issued in reference to such cases, which are still operative.

When soldiers, to whom certificates of right have not been issued, who made their original homestead entries for less than one hundred and sixty acres prior to June 22, 1874, and who have not exhausted their additional rights, apply in person to make entries, you will, as heretofore, before allowing the application to go to record, transmit the same to this office for examination as directed in the circular letter of February 18, 1890, which is still operative in regard to this class of claims.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved:
HOKE SMITH, *Secretary.*

Endorsed: Defendants' Exhibit "L." Filed May 1st, 1909. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy Clerk.

Clerk's Certificate.

United States Circuit Court, District of Minnesota, Fifth Division.

UNITED STATES OF AMERICA,
District of Minnesota, ss:

I, Henry D. Lang, Clerk of the United States Circuit Court, District of Minnesota, Do Hereby Certify that the foregoing papers writing contain all the pleadings, evidence, exhibits and other proceedings in the equity cause entitled John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, complainants, vs. The Santa Fe Pacific Railroad Company and J. E. Lundrigan, defendants and numbered 656 constitute the record for the final hearing of said cause, as required by the Rules of this Court.

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And I Further Certify That I have carefully compared said papers writing, and each of them, with their respective originals, which are in my custody as said Clerk, and duly filed in said cause, and that the same are correct and true copies of said originals, and of the whole thereof.

In Testimony Whereof, I have hereunto set my hand as Clerk, and attached the seal of said Court at Duluth, said District and Division, this 26th day of July, A. D. 1909.

[SEAL.]

HENRY D. LANG, *Clerk,*
By THOS. H. PRESSNELL, *Deputy.*

That said cause came on for final hearing in equity on the 9th day of August, A. D. 1909; and that the proceedings therein, as recorded in the term minutes of said Court, Vol. 12, p. 77, were as follows, to-wit:

MONDAY, *August* 9, 1909.

This cause coming on to be heard upon the final record in Equity and the files in said action, all the parties appear by their respective solicitors, Messrs. C. D. O'Brien and P. H. Seymour appear on behalf of the complainants and Messrs. Wm. E. Culkin and L. C. Harris appear on behalf of defendant J. E. Lundrigan, and proceedings are had therein as follows, to-wit:

C. D. O'Brien, Esq., states the case to the Court on behalf of the complainants.

L. C. Harris, Esq., states the case to the Court on behalf of the defendant J. E. Lundrigan.

C. D. O'Brien, Esq., opens his argument to the Court on behalf of the complainants.

L. C. Harris, Esq., argues to the Court on behalf of defendant J. E. Lundrigan.

C. D. O'Brien, Esq., closes his argument on behalf of complainants.

And, having heard the arguments and statements of Counsel for the respective parties, being fully informed in the premises, the matter is, by the Court taken under advisement.

83 That on the 3d day of September, A. D. 1909, there was filed with said Clerk the Final Decree in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

No. 656. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,

vs.

THE SANTA FE PACIFIC RAILWAY COMPANY and J. E. LUNDRIGAN, Defendants.

This cause coming on to be heard at the General July Term of said Court, held in the City of Duluth, County of St. Louis and State of Minnesota, in the month of August, A. D. 1909, before the Hon. Page Morris, Judge of said Court, Messrs. P. H. Seymour and C. D. O'Brien appearing as solicitors for Complainants, and William E. Culkin and Luther C. Harris appearing as solicitors for the defendants,

And the complainants and the defendants having introduced their proof, and the counsel for the respective parties having argued said cause, the Court having duly considered the same and being duly advised in the premises;

Now, Therefore, on motion of William E. Culkin and Luther C. Harris, solicitors for the defendants;

It Is Hereby Ordered, Adjudged And Decreed, that the bill of complaint herein be and the same hereby is dismissed.

It Is Further Ordered, Adjudged And Decreed, that the said complainants have no right, title or interest, in and to the Southwest Quarter of the Southeast Quarter (SW¼) of -SE¼) of Section Thirteen (13), in Township Fifty-five (55), North of Range Twenty-six (26) West of the Fourth Principal Meridian, located in the County of Itasca and State of Minnesota.

It Is Further Ordered, Adjudged And Decreed, that the above named defendant, J. E. Lundrigan, is the owner in fee simple of the above described premises, free and clear of any right, claim or demand upon the part of the said complainants, or any of them.

It Is Further Ordered, Adjudged And Decreed, that the said defendant, J. E. Lundrigan, recover of and from said complain-
84 ants, the costs and disbursements allowed by law and to be taxed by the Clerk of said Court.

Dated and entered this 3rd day of September, A. D. 1909.

PAGE MORRIS, *Judge.*

Upon motion of P. H. Seymour, Esq., solicitor for complainants, solicitors for defendant consenting thereto, it is, by the Court

Ordered: That execution herein, and all further proceedings, except the taxation of costs and the entry of judgment therefor, be and the same hereby are stayed for the period of forty-two (42) days from and after this date, to enable the plaintiff to prepare and present a bill of exceptions and make a motion for a new trial.

Endorsed: Decree. Filed Sept. 3, 1909. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 20th day of September A. D. 1909, there was filed with said Clerk, the Appeal and order allowing same, Bond on Appeal, and the Assignment of Error, in said cause, in the words and figures following, to-wit:

United States Circuit Court, District of Minnesota, Fifth Division.

In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,

vs.

THE SANTA FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

The above named complainants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, conceiving themselves aggrieved by the decree entered in said Court on the third day of September, one thousand nine hundred and nine (1909) in the above entitled cause, do hereby appeal from the said decree to the United States Circuit Court of Appeals for the Eighth Circuit, and they pray that this their appeal may be allowed, and that a trans-

cript of the record, proceedings and papers upon which said decree was entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

C. D. O'BRIEN and
P. H. SEYMOUR,
Solicitors for Appellants.

85 And now to wit, on the 20th day of September, 1909, it is ordered that the said appeal be allowed as prayed for.

PAGE MORRIS,
United States District Judge for the District of Minnesota, Fifth Division, Sitting as United States Circuit Judge for said District.

Entered No. 656. No. —. United States Circuit Court District of Minnesota. 5th Division. John E. C. Robinson et al. vs. The Santa Fe Railroad Company and J. E. Lundrigan, Defendant. Appeal and order Allowing Same. Ent'd T. M. Vol. 12 p. 126. Filed Sept. 20, 1909. Henry D. Lang, Clerk. By Thos. H. Presnell, Deputy Clerk.

United States Circuit Court, District of Minnesota, Fifth Division.

In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,
vs.
THE SANTA FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

Know all men by these presents—that we John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, as principals and D. M. Gunn and W. C. Gilbert of Grand Rapids, Itasca County, Minnesota, as sureties, are held and firmly bound unto the defendant, J. E. Lundrigan, in the sum of five hundred ($500.00) dollars to be paid to said defendant above named for the payment of which well and truly to be made, we bind ourselves and each of us, and each of our heirs, executors, administrators and assigns jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 16th day of September, A. D., one thousand nine hundred and nine.

Whereas the above named complainants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, have presented an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, to reverse the decree rendered in the above entitled suit, by the Circuit Court of the United States for the District of Minnesota, Fifth Division.

Now therefore the condition of this obligation is such that if the above named appellants shall prosecute said appeal to effect, and

answer all damages and costs, if they fail to make said appeal
86 good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

GEO. A. FAY, [SEAL.]
JOHN BECKFELT, [SEAL.]
JOHN E. C. ROBINSON, [SEAL.]
B. C. FINNEGAN, [SEAL.]
D. M. GUNN, [SEAL.]
W. C. GILBERT, [SEAL.]

In presence of
J. D. DORAN,
WILLARD A. ROSSMAN,
As to Beckfelt, Finnegan, Gunn & Gilbert.
J. I. DONOHUE,
A. A. WEBER,
As to John E. C. Robinson.
P. H. SEYMOUR,
BERT W. FORBES,
As to Geo. A. Fay.

STATE OF MINNESOTA,
County of Stearns, ss:

On the Eighteenth day of September, 1909, before me a Notary Public within and for said County personally appeared John E. C. Robinson, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.] J. I. DONOHUE,
N. P. etc.

STATE OF MINNESOTA,
County of Itasca, ss:

On this 16th day of September, 1909, before me a Notary Public within and for said county, personally appeared John Beckfelt, B. C. Finnegan, D. M. Gunn and W. C. Gilbert, to me known to be the persons described in and who executed the foregoing instrument and severally acknowledged that -he- executed the same as *his* free act and deed.

[SEAL.] WILLARD A. ROSSMAN,
N. P. etc.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 20th day of September, 1909, before me a Notary Public within and for said County, personally appeared George A. Fay, to me known to be the person described in and who executed
87 the foregoing instrument and acknowledged that he executed the same as his free act and deed.

[SEAL.] BERT W. FORBES,
N. P. etc.

STATE OF MINNESOTA,
County of Itasca, ss:

D. M. Gunn and W. C. Gilbert being duly sworn each for himself, doth depose and say that he is the person named in and who executed the foregoing instrument, that he is a resident and freeholder of the state of Minnesota, and worth the sum of five hundred dollars ($500.00) over and above his debts and liabilities, and exclusive of his property exempt from execution.

[SEAL.]

D. M. GUNN,
W. C. GILBERT,

Subscribed and sworn to before me this 16th day of September, 1909.

WILLARD A. ROSSMAN,
N. P. etc.

The within bond and sureties therein are hereby approved this 20th day of September, 1909.

PAGE MORRIS, *Judge.*

Endorsed: Bond on Appeal. Filed Sept. 20, 1909. Henry D. Lang, Clerk, By Thos. H. Pressnell, Deputy Clerk.

United States Circuit Court, District of Minnesota, Fifth Division.

In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Complainants,
vs.
THE SANTA FE PACIFIC RAILROAD COMPANY and J. E. LUNDRIGAN, Defendants.

Come now the Complainants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, in the above entitled case, and file the following assignments of error upon which they, and each of them, will rely in their appeal from the decree of this Honorable Court entered on the third day of September, A. D., 1909, in said cause.

I.

That said Court erred in directing and entering a decree in said cause in favor of the defendant, J. E. Lundrigan and against the said Complainants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, and awarding to the said defendant- costs in the sum of $44 45/100.

II.

That said Court erred in not directing and entering a decree in favor of said Complainants and against said defendants.

III.

That said Court erred in its decree that the said Complainants have no right, title or interest in and to the land described in the bill of complainant herein, towit:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section thirteen (13), Township fifty-five (55) North, Range twenty-six (26) West of the Fourth Principal Meridian, located in the County of Itasca, State of Minnesota.

IV.

That said Court erred in its decree that the defendant, J. E. Lundrigan is the owner of the fee simple of the above described premises free and clear of any right, claim or demand upon the part of the Complainants or any of them.

V.

That said Court erred in dismissing Complainants' bill of complaint herein.

VI.

That said Court erred in not deciding that Complainants are the equitable owners of the above described premises and that said defendant holds the legal title hereof as trustee for said Complainants.

VII.

That said Court erred in not ordering, adjudging and decreeing that said defendant, J. E. Lundrigan should convey the legal title to said described premises to complainants, as prayed for in the bill of complainant herein.

VIII.

That said Court erred in not finding and deciding that the application of complainant, John E. C. Robinson, made January 24, 1901, to enter said described premises under the provisions of Section 2306 R. S., as assignee of one James Carroll, segregated the same and removed it from liability to other disposal, during the pendency of said application.

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IX.

That said Court erred in not deciding that the substitution by said complainant, John E. C. Robinson, of the soldiers' additional homestead right of one Justus F. Heath, for that of said James Carroll, on October 4, 1905, related to and became effective as of the date of said Robinson's application to enter, made January 24, 1901, to the exclusion of all other applications made subsequent thereto.

X.

That said Court erred in not finding and deciding that said substitution was made by authority of the Land Department of the United States.

XI.

That said Court erred in not finding and deciding that said substitution was made and allowed in accordance with the rule, regulations and settled practice of said Land Department in force at the time thereof, as well as the date of said complainant's application of January 24, 1901.

XII.

That said Court erred in not finding and deciding that said rule, regulation and settled practice of the Land Department constituted a rule of property, under which the rights of complainants vested.

XIII.

That said Court erred in not deciding that the said Land Department had no authority to disturb rights acquired in accordance with the rules, regulations and settled practice in force at the time, by the retroactive application of a different rule and regulation subsequently adopted.

XIV.

That said Court erred in not finding and deciding that the issuance of the patent of the United States to the defendant, Santa Fe Pacific Railroad Company, was in derogation of the prior rights of complainant, John E. C. Robinson, and his assigns, and operated only to vest in said patentee, and its assigns, the legal title to the described premises as trustee for the complainants.

Wherefore the complainants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, pray that the said decree
90 of the Circuit Court of the United States for the District of Minnesota, Fifth Division, in the above entitled cause, may be reversed.

C. D. O'BRIEN AND
P. H. SEYMOUR,
Solicitor for and of Counsel with Complainants.

Endorsed: Assignments of Error. Filed Sept. 20, 1909. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy Clerk.

That on the 22nd day of September, A. D. 1909, there was filed with said Clerk the Citation in said cause, with acceptance of service duly endorsed thereon, in the words and figures following, to-wit:

UNITED STATES OF AMERICA:

Circuit Court, Eighth Circuit.

Citation.

United States of America, to John E. Lundrigan, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at

the City of St. Louis, Missouri, sixty days from and after the day this citation bears date, pursuant to an appeal allowed and filed in the Clerk's Office of the United States Circuit Court, District of Minnesota, 5th Division, wherein John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan are Appellants and you are Appellee, to show cause, if any there be, why the Decree rendered against the said Appellants as in said Appeal mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Honorable Paige Morris, Judge of the United States District Court, District of Minnesota, sitting as Judge of the United States Circuit Court, said District, this 20th day of September, A. D. 1909.

PAGE MORRIS, *Judge.*

Due service of the foregoing Citation by Copy at Duluth, Minnesota, is hereby admitted this 22nd day of Sept., 1909.

WM. E. CULKIN,
LUTHER C. HARRIS,
Solicitors for John E. Lundrigan.

91 Entered No. 656. No. 656. United States Circuit Court, District of Minnesota, 5th Division. John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Appellants, vs. J. E. Lundrigan, Appellee. Citation. Filed this 22d day of September, 1909. Henry D. Lang, Clerk. By Thos. H. Pressnell, Deputy.

Clerk's Certificate.

I, Henry D. Lang, Clerk of said Court do hereby certify and return to the Honorable the United States Circuit Court of Appeals for the Eighth Circuit, that the foregoing consisting of 152 pages numbered from 1 to 152 inclusive, is a true and complete transcript of the records, pleadings, evidence, final decree and all other proceedings in the cause entitled John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Complainants, vs. The Santa Fe Pacific Railroad Company and J. E. Lundrigan, defendants, as appears from the original records and files of said Court; and I further certify and return that I have attached to said transcript and included within said paging the original Appeal and Order Allowing same, and Citation with admission of service thereof by the solicitor for the defendants.

In Witness Whereof I have hereunto set my official signature as Clerk aforesaid, and affixed the seal of said Court at the City of Duluth, said District and Division, this 28th day of September, A. D. 1909.

[Seal U. S. Circuit Court, Dist. of Minnesota, Fifth Division.]

HENRY D. LANG, *Clerk,*
By THOS. PRESSNELL, *Deputy.*

Filed Sep. 30, 1909. John D. Jordan, Clerk.

92 (*Appearance of Counsel for Appellee.*)

On the thirtieth day of September, A. D. 1909, the appearance of counsel for appellee was filed in said cause, in the words and figures following, to-wit:

Circuit Court of Appeals, Eighth Division.

No. 3171.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. DAY, and B. C. FINNIGAN, Appellants,
vs.
J. E. LUNDRIGAN, Appellee.

The Clerk will please enter our appearance as counsel for appellee in the above entitled action.

LUTHER C. HARRIS,
WM. E. CULKIN,
Counsel for Appellee.

Dated Sept. 28, 1909.

(Endorsed:) Circuit Court of Appeals, Eighth Division. No. 3171. John E. C. Robinson, et al., Appellants, vs. J. E. Lundrigan, Appellee. Notice of Appearance for Appellee. Luther C. Harris and William E. Culkin. Filed Sep. 30, 1909, John D. Jordan, Clerk.

(*Appearance of Counsel for Appellants.*)

And on the sixth day of October, A. D. 1909, the appearance of counsel for appellants was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 3171.

JOHN E. C. ROBINSON et al., Appellants,
vs.
JOHN E. LUNDRIGAN.

The Clerk will enter my appearance as Counsel for the Appellants.

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C. D. O'BRIEN,
St. Paul, Minn.;
P. H. SEYMOUR,
Duluth, Minn.,
Solicitor- for and of Counsel with Appellant.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 3171. John E. C. Robinson, et al., Appellants, vs. John E. Lundrigan. Appearance. Filed Oct. 6, 1909, John D. Jordan, Clerk. C. D. O'Brien, P. H. Seymour, Counsel for Appellants.

(Order of Submission.)

And on the twentieth day of January, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

No. 3171.

JOHN E. C. ROBINSON et al., Appellants,
vs.
JOHN E. LUNDRIGAN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

THURSDAY, *January* 20, 1910.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. D. O'Brien in behalf of the appellants, continued by Mr. Luther C. Harris and Mr. William E. Culkin for the appellee and concluded by Mr. C. D. O'Brien for the appellants. Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(Opinion.)

And on the twenty-third day of March, A. D. 1910, an opinion of said United States Circuit Court of Appeals for the Eighth Circuit was filed in said cause, in the words and figures following, to-wit:

94 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3171.

JOHN E. C. ROBINSON et al., Appellants,
vs.
JOHN E. LUNDRIGAN, Appellee.

Appeal from the Circuit Court of the United States for the District of Minnesota.

Mr. C. D. O'Brien (Mr. P. H. Seymour with him on the brief), for appellants.
Mr. Luther C. Harris and Mr. William E. Culkin for appellee.

Before Sanborn and Adams, Circuit Judges, and Riner, District Judge.

RINER, *District Judge*, delivered the opinion of the court.

This was a bill in equity brought by the appellants who were plaintiffs in the court below, and who will be hereafter referred to as plaintiffs, against the Santa Fe Pacific Railroad Company and John E. Lundrigan, defendants.

The railroad company filed a disclaimer and the case proceeded against the appellee alone, who will be hereafter referred to as the defendant.

The purpose of the bill as disclosed by the prayer was to have the Court adjudge: (1) that the plaintiffs were the owners of the land described in the bill and entitled to the legal title thereto; (2) that the defendant be declared to hold in trust for the plaintiffs whatever interest he had in the legal title to the land; (3) that the defendant be commanded and compelled to convey by suitable conveyance to the plaintiffs all such right, title or interest as he had in the estate.

It appears from the record that John E. C. Robinson, one of the plaintiffs, as assignee of James Carroll, on the 24th of January, 1901, applied at the United States Land Office at Cass Lake, Minnesota, to make a soldier's additional homestead filing upon the southwest quarter of the southeast quarter of section thirteen, Township fifty-five North, Range twenty-six West of the Fourth Principal
95 Meridian. The application was received, (but not allowed as an entry), a notation being made upon the records that it was an application, and the papers were forwarded to the General Land Office at Washington for the purpose of examination in connection with the official records, as required by the rules of the Land Department.

On the 23d of March, 1904, the Commissioner of the General Land Office held for rejection the application made by Robinson, as assignee of Carroll, and on the 28th of January, 1905, he directed

the Register and Receiver at Cass Lake to order a hearing, and directed that at said hearing Robinson be allowed to show, if he could, the validity of the Carroll right.

On the 22d of May, 1905, a hearing was ordered for the 29th of June, and a notice was served upon Robinson to appear and offer any evidence he might have, tending to establish the validity of the Carroll right. On the date fixed for the hearing, Special Agent S. J. Colter appeared before the Register and Receiver, representing the government, but Robinson failed to appear, either in person or by counsel, and offered no evidence whatever, the only evidence offered at the hearing being the evidence offered by Special Agent Colter.

The Register and Receiver found that the assignor, James Carroll, has not performed military service in the Army, Navy, or Marine Corps of the United States during the War of the Rebellion, and recommended the rejection of Robinson's application. This decision of the Register and Receiver bears date July 15, 1905.

On the 27th of July, 1905, Robinson filed in the Local Land Office at Cass Lake what he called an appeal, but which in fact was nothing more than a petition for an extension of time within which to make another application. We say it was not an appeal because he takes no exception whatever to the ruling of the Register and Receiver; on the contrary in his appeal, or petition, he says: "Appellant is deeply sensible and appreciates the seriousness of defaulting at said hearing, and does not ask that the case be re-opened. This appeal is not taken for the purpose of hindering or delaying the adjustment of long drawn out matters, but with a hope, and urgent request, that under the circumstances appellant be given thirty days within which to rescrip said above mentioned tract."

On the 29th of August, 1905, J. H. Fimple, Acting Commissioner of the General Land Office, affirmed the decision of the Register and Receiver, rejected Robinson's application, declared the case closed, and directed the Register and Receiver to so note upon their records. He further directed them to notify Robinson that he would be allowed thirty days from receipt of notice in which to file a proper substitute for the rejected application.

On the 4th of October, 1905, Robinson, as assignee of one Justus F. Heath, filed a second additional homestead entry upon the land, and this application, like the first, was forwarded to the General Land Office at Washington for examination and approval.

96 February 15, 1906, the Commissioner having found that Heath was entitled to a soldier's additional homestead right for eighty acres under Section 2306, Revised Statutes, and that Robinson had properly acquired, by assignment, the right to forty acres thereunder, directed the Register and Receiver at Cass Lake, on payment of the legal fee and commissions, to allow the entry in the name of Robinson as assignee of Heath and to issue the original and final receipts and final certificate. March 2, 1906, Robinson paid the fees and commissions, and on the same date the final certificate was issued to him.

July 11, 1905, the Santa Fe Pacific Railroad Company applied to select the same land under the Act of June 4, 1897, 30 U. S. Stat-

utes at Large, 36. The application was received by the Local Land Office subject to Robinson's soldier's additional application under the James Carroll assignment. This application was made eighteen days after the hearing at which Robinson failed to appear, four days prior to the decision by the Register and Receiver therein, and twelve days before Robinson filed his application for an extension of time within which to rescrip the land.

At the time the final certificate to Robinson was issued by the Local Land Officers, they rejected the application of the Railroad Company. Upon receiving notice thereof the Railroad Company appealed. June 14, 1906, the Commissioner of the General Land Office reversed the findings of the Register and Receiver and held Robinson's entry and final certificate for cancellation. Robinson then appealed to the Secretary of the Interior, where the decision of the Commissioner was affirmed. A petition for a re-hearing was filed by Finnegan, a grantee of Robinson's, but was denied by the Secretary. On July 20, 1908, a patent for the land in controversy was issued to the Santa Fe Pacific Railroad Company, and on the 18th day of November, 1908, the Santa Fe Pacific Railroad Company sold and conveyed the land to the defendant, John E. Lundrigan.

The validity of the application made by the Santa Fe Pacific Railroad Company is not questioned, and the record shows that it was pending and had been pending almost three months at the time Robinson's application under the Heath soldier's additional homestead right was filed. Neither is it anywhere insisted by the plaintiffs that the Carroll soldier's additional right was ever at any time a valid right, indeed its invalidity was fully recognized by Robinson, if not in words certainly by his acts. He did not appear at the hearing after due notice, neither did he apply to the Local Land Officers to have the hearing postponed, if, for the reason stated by him he could not attend at the time fixed for the hearing, nor did he make any effort whatever to sustain the validity of the Carroll right; and in his petition to the Commissioner for an extension of time "within which to rescrip" the land, expressly states that he "does not ask that the case be re-opened," thus recognizing, as the Department held, that it was absolutely void.

97 The question is thus presented whether or not a person who applies to enter public land with a void soldier's additional right is entitled, after his invalid application has been rejected, to a grant of additional time within which to obtain another right with which to enter the land where a valid application for the land has been received, and is pending, at the time the holder of the invalid right makes his application for additional time.

It is to be observed in considering this question that an application under soldier's additional scrip is not an entry of the land, but merely an application to enter. In ex parte John C. Ferguson, (not reported), where the facts were identical with the facts in the case at bar, the Secretary said: "Since the case of Stewart v. Peterson (28 L. D. 515), the Department has held that any application presented during the existence of an entry of record must be rejected outright, and that no rights can be recognized as having been acquired by the presentation of an application to enter at such time.

But the case at bar is different. There was no entry of the tract described and there is none now. McBean presented an application to enter. It was forwarded to your office for consideration and there rejected. His application was simply tentative and the most that it can be held to have done, as has been often decided, was to protect any rights that he might have as against other applicants, or in the words used in the books, it was equivalent to an entry only so far as his rights were concerned. Therefore, there is no good reason apparent why the application of Ferguson should not have been held to await that of McBean. As it appears that the latter had no rights, he conseqnently took nothing by his application, and his appeal from the decision rejecting his application, of course, placed him in no better position. This being so, that application should be no bar to the allowance of the application of Ferguson."

The Land Office Circular in force at the time this application was made provides that an additional entry not accompanied by a certificate of right from the General Land Office (and this entry was in that form) must be forwarded by the Local Office to the General Land Office for consideration and for instructions relative to allowing the entry. It further provides that proper notations should be made by the Local Officers on their records, showing the pendency of the application and the consequent segregation of the land, the legal effect of which is to give the applicant the preference right to enter the land in case the additional homestead is found to be valid. No fees or commissions are required or paid at the time the application is filed. If, after examination by the General Land Office, the soldier's additional application is found to be valid, the Register and Receiver are directed to allow the entry and to collect the fees and commissions as in cases of original entry. When this is done the Receiver issues his receipt therefor and the Register his final certificate.

There is a material difference between soldier's additional homestead scrip and military bounty land warrants, state school
98 indemnity land selections, Sioux Half-breed scrip and other land scrip of like character, in that, the several kinds of scrip last mentioned are examined by the Department and their validity certified prior to location. The location of the scrip, therefore, constitutes an entry and the rules governing such scrip are not applicable to soldier's additional scrip for the reason that in the one case filing the scrip in the Local Land Office constitutes an entry, while in the other, filing the scrip in the Local Land Office constitutes an application only and cannot become an entry until specially authorized by the Commissioner of the General Land Office. The cases, therefore, called to our attention at the argument, and in the brief of plaintiff, involving military bounty land warrants and scrip of like character, are not in point.

It is not insisted, and indeed could not be, that the statute itself authorizes an extension of time in case of a void application. Section 2306 of the Revised Statutes, by which the soldier's additional right is created, reads as follows: "Every person entitled under the provisions of Section 2304 to enter a homestead who may have heretofore entered under the homestead laws, a quantity of land less than

one hundred sixty acres shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred sixty acres." It is to be noted that this right is granted by the statute only to persons entitled under the provisions of Section 2304 to enter a homestead, and the Department found, upon the evidence submitted, that James Carroll, Robinson's assignor, had not rendered military service and was not entitled to exercise the right, and as Robinson, the assignee, acquired and could acquire only such rights as his assignor had, he got nothing by his purchase and no right of entry could be based thereon.

It is, however, insisted by the plaintiffs that there was a rule and practice prevailing in the Department which authorized the extension of time in such cases, and they direct our attention to the case of Robeson T. White, 30 L. D. 61, and Land Office Circular dated February 18, 1890, in support of their contention.

In the case of Robeson T. White, White initiated a contest against a previous entry by McCrimmon and was successful, McCrimmon's entry being cancelled October 14, 1898. On the same day White, assignee of Winifred Carver, widow of George W. Carver, made application to make additional homestead entry for the land, under Section 2306 of the Revised Statutes. White had a preference right to make the entry under Section 2 of the Act of May 14, 1880, 21 Stat., 140, as successful contestant against a former entry. September 9, 1899, William Moran filed a protest against the application, which was rejected, and in October, 1899, White filed a second additional homestead application as assignee of Jacob Pugh on the same land.

As a reason for offering the Pugh additional application, White, in his affidavit, stated: "Affiant was advised by counsel that
99 there seemed to be an infirmity in the Carver right. * * *
Desiring to retain and assure his right to said land and the exercise of his preference right of entry thereon, * * * and to evidence his good faith * * * he procured the soldier's additional homestead certificate of Jacob Pugh and filed same * * * with an application to locate the same on the land described, to the end, and to no other, that should an incurable infirmity be found in said Carver right, the said Pugh certificate might be taken and used in whole or in part as the consideration for the exercise of his preference right. He had no purpose, in so filing the said Pugh certificate, of abandoning his first application nor any right obtained thereby; on the contrary he did it for the express purpose of retaining and maintaining his preference right to the entry."

Upon examination it was found that the first application under the Carver right was a valid one, and the Department properly held that by making the second application under the Pugh right he did not waive any right acquired by the first application under the Carver right. In disposing of the question, the Secretary said: "To constitute a waiver of right, one must, with full knowledge of his right, do or forbear doing something inconsistent with the right and of his intent to rely upon it." Bennecke v. Connecticut Mutual Life Insurance Company, 105 U. S. 355; Pence v. Langdon, 99 U. S. 578.

The distinction between that case and the case at bar is at once apparent. The question of the right to substitute a valid for an invalid right was not involved in the White case. The statute gave him a preference right as the successful contestant, and his offer to pay for the land by the tender of soldier's additional scrip was merely in aid of that right; moreover, the scrip which he tendered was found upon examination to be valid.

Neither do we think the circular of February 18, 1890, tends to support the contention of counsel. It makes no reference whatever to the right of substitution, and the reason therefor is at once apparent when we examine the Act of March 3, 1893, 27 Stats. at Large, 593, which provides: "That where soldier's additional homestead entries have been made or initiated upon a certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and said certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land." It will be noticed that the statute confines the right to purchase the land to cases where homestead entries have been made or initiated upon the certificate of the Commissioner of the General Land Office of the right to make such entry, and then only in cases where there is no adverse claimant. In view of this statute the Department had no power to make a rule which would cut off the right of an adverse claimant, and after diligent search we have been unable to find a single case where it has attempted to do so. Numerous cases may be found where the Department has permitted the substitution of valid for in-
100 valid rights, but on examination of these cases it will be found that the permission was granted upon the express condition that they did not conflict with adverse rights already pending. There are also cases where there was a valid base, that is, where the assignor, the soldier, had rendered military service and was entitled to soldier's additional scrip, but by reason of some defect therein which might be cured, he or his assignee was allowed to make the correction and the entry sustained, but that is not this case. Here there was no base upon which to establish an entry. Carroll, the alleged soldier, had never performed military service as required by the laws of the United States to entitle him to a soldier's additional homestead entry. His right being void, Robinson got nothing by the assignment and the Commissioner had no authority to give him time within which to substitute a valid right if it conflicted, as it did in this case, with an adverse claim, for the statute provides that this can be done, even upon the Commissioner's certificate, only where there is no adverse claimant. The Commissioner's letter must be read in the light of the legislation of Congress, and when so read there is nothing found therein inconsistent with the statute. In his letter to the Register and Receiver he says: "Your said decision is accordingly affirmed, and the application is rejected and the case closed. You will so note on your records. You will also notify the applicant that he will be allowed thirty days from notice hereof in which to file a proper substitute for the right rejected." True he

did not insert the words if "there is no adverse claimant," but that was unnecessary in view of the statutes and the decisions of the General Land Office. His letter, therefore, was merely authority for the Local Land Officers to receive the second entry under the Heath right in the event that there was no adverse claim. This was the extent of his power and it is not to be presumed that he intended to go beyond it. In other words, the fact that Robinson had filed a void application was held not to deprive him of the right to file a new and valid application if the land remained open and there was no adverse claimant.

In the case of the Northern Pacific Railway Company v. Charles P. Maginnis, not reported, the Secretary of the Interior said: "In the absence of an intervening application there can be no question but that the substitution of another application might be allowed at any time, but it cannot be assumed that with a presentation of a soldier's additional application there is carried a right, in the event the application fails, to substitute another. The substituted application is in reality a new application and no rights are gained thereunder because of any prior application. An intervening application clearly bars the right of substitution."

Our attention is directed to the case of the Germania Iron Company v. James, et al., 89 Fed. 811, wherein this court, speaking through Judge Sanborn, said: "An established rule of practice of the Land Department, that after a decision by the Secretary has been made, cancelling an entry of public land, no subsequent entry of such lands can be allowed until the decision has been officially communicated to the Land Officers, and a notation of the cancellation made on their plats and records." We have no inclination to depart from or to modify in any degree the rule announced in that case, but the court was there dealing with a very different question from the question here presented. The case was before the court upon a demurrer to the bill. The bill alleged that on February 18, 1889, the land in question had been segregated from the public domain and appropriated to private use by the location of Sioux Half-breed scrip upon it. A contest had arisen between the locator of the scrip and one who subsequently applied to pre-empt the land, had been heard by the Local Land Officers at Duluth, Minnesota, and was pending on appeal before the Secretary of the Interior. The Secretary decided that the location of the scrip was invalid, that the attempted pre-emption was fraudulent, and that the land in question was open to disposal under the public land laws of the United States. The decision of the Secretary of the Interior was received by the Local Land Officers on the evening of February 22, 1889, and on the morning of February 23, before the office was opened for business, cancellation of the entry of this land under the Sioux scrip was noted on the books and plats of the Local Land Office. At nine o'clock in the forenoon of that day the office opened and Hartman was the first person who applied to enter the land after the office was opened, and this court held that Hartman was entitled to the land, he being the first in time to apply after a notation of the cancellation had been made upon the plats and records of the Local Land Office.

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There was a rule then in force in the Department of the Interior, recognized by a long line of decisions by the Department Officers, providing and declaring that no decision of the Secretary of the Interior or the Commissioner of the General Land Office cancelling an entry or appropriation of public lands should take effect as a release of such lands from such entry or appropriation, or as a restoration thereof, to the public domain, open to entry or disposal under the public land laws until such decision had been officially communicated to the Local Land Offices of the District in which the lands described were contained; and until notations of such cancellation had been made upon the plats or other records of the Local Land Office, no application or entry could be received. After that had been done the first in line secured the right.

It will be observed that that case, and the cases cited in support of it, were all cases where entry had been made at the Local Land Office. In the case before us no entry was made, nothing but a mere application to enter had been filed, and in such cases junior applications are received subject to any right which may be found to exist under the first application. As was said by the Secretary in an appeal from the Commissioner, in the case of Frederick L. Gilbert, et al., 35 L. D. 422-424, where a soldier's additional application was involved, "The Local Officers being without authority to act upon them they are permitted to accept them when presented prior to the allowance of entry by your office, and all rights
102 thereunder attach in the order of the filing of the respective applications in the Local Office. It would therefore be manifestly inequitable in those cases where applications were properly filed and accepted to permit a substitution of rights to the prejudice of the rights of applicants attaching subsequently to the filing of the original application but prior to the filing of the application to substitute another right in lieu thereof, * * * where each of the respective rights asserted is based upon naked applications independent of any superior or controlling equity." It was further said in the case: "But after entry has been allowed by your office, until the same is cancelled no rights are gained by the filing of other applications therefor and the Local Officers should refuse to accept them." The case just cited is a clear statement of the distinction recognized by the Department of the Interior between a soldier's additional application and the entry itself. The conclusion reached is that the decree of the Circuit Court for the District of Minnesota was right, and it is

Affirmed.

Filed March 23, 1910.

SANBORN, *Circuit Judge*, dissenting:

The application of Robinson filed on January 24, 1901, to enter the land in question and to pay for it with the Carroll additional homestead certificate was noted on the plat by the Local Land Officers on that day. The application and notation did not effect a completed entry, but so far as the rights of Robinson were concerned they were equivalent to an entry. They protected his pref-

erence right to enter the land against all other parties as effectually as an entry would have done and they prevented the appropriation of the lands by the Santa Fe Company or any other applicant until the application was finally rejected on May 13, 1907. They differed from a completed entry only in this, that the junior applicant might acquire a preference right of entry against others but not against Robinson during the pendency of his application while such a junior applicant could not acquire such a preference right after an entry.

The decision of the Register and Receiver on July 15, 1905, that the Carroll additional certificate was invalid was followed on July 27, 1905, by a petition of Robinson that he might be granted thirty days in which to "re-scrip the above mentioned tract." This petition is to be read in the light of the rule and practice which will be shown to have existed in the Land Department at that time to permit an applicant whose additional homestead certificate proved defective to substitute a valid certificate in its place and to support his original application thereby. The petition was not for leave to make another application for the land. It was to substitute another additional homestead certificate as payment for the land in support of his original application. These additional homestead certificates are like cash, bounty land warrants, Sioux Scrip and Agricultural College Scrip, mere means by which the government may
103 be paid for the lands sought by the applicants. The Acting Commissioner of the Land Office so understood the petition, for his answer to it was not a cancellation but a maintenance of Robinson's original application on condition that within thirty days after notice to him he should file a substituted additional homestead certificate. The Commissioner said in his instruction to the Register and Receiver: "You will also notify the applicant that he will be allowed 30 days from notice hereof in which to file a proper substitute for the right hereby rejected, and, if at the expiration of said period the applicant has not filed such substitute you are directed to hold the said tract subject to entry from that time by the first qualified applicant." Within the thirty days after notice and on October 4, 1905, Robinson filed his substitute, the Heath additional homestead certificate, and it was accepted, and Robinson was permitted to enter the land and to pay for it, not on a new, but on his old application, and a final certificate was issued to him thereon on March 2, 1906.

But on July 11, 1905, before the substituted certificate had been filed, the Santa Fe Company had applied to select this land, and it contended and finally persuaded the officers of the Land Office to hold that Robinson's substitution of a valid for an invalid additional homestead right, in other words, a good for bad payment for the land, was not permissible and to issue the patent to the Santa Fe Company for that reason. Robinson insists that this decision and act were violative of an established rule and practice of the Land Department to permit such substitutions, which were and had long been in existence on October 5, 1905, when he filed his substituted additional and until after he had completed his entry. This contention presents the decisive question of law in the case in hand.

A rule and a settled practice of the officers of the Land Department relative to the acquisition of the public lands is a rule of property in accordance with which applicants have the legal right to have their rights to these lands which are acquired under such a rule determined and neither the Secretary of the Interior nor the Commissioner of the Land Office may lawfully deprive them of this right by a subsequent abrogation of the rule or the practice and the promulgation of a different one. The new rule and practice may govern rights acquired after its promulgation, but the rule of property in existence at the inception of the rights in question determines their validity and extent. Retroactive decisions and rules of the officers of the Land Department as well as those of the courts are as vicious and ineffectual as retroactive laws. Germania Iron Company v. James, 89 Fed. 811, 817, 32 C. C. A. 348, 354.

What then was the rule and practice of the Land Department as to the substitution of additional homestead certificates on October 4, 1905, when Robinson filed his substitute? It was and still is the rule and practice of the Land Department to permit the substitution of valid bounty land warrants and agricultural college script for defective warrants and scrip offered in payment for land,
104 and soldier's additional homestead certificates are of the same nature. Hussman v. Berry, 6 L. D. 375; Hussman v. Durham, 165 U. S. 144; Webster v. Luther, 163 U. S. 331. Robinson alleged in his bill that when he filed his substitute additional homestead right a like rule and practice existed and had existed for many years to the effect that when the additional homestead of an applicant proved defective a valid additional homestead right might be substituted for it in support of the original application so that the substituted additional homestead related back to the date of the original application and prevailed over junior applications which were necessarily made subject to this rule. The defendant answered this averment that prior to March 24, 1906, "there was a rule and practice prevailing in the department, that upon the rejection of a soldier's additional homestead right to make an entry of public lands, the said applicant might apply for and take and enter said lands with another valid soldier's additional right, but this defendant alleges that said rule and practice was limited in its application to those cases where no other adverse right was pending at the time the so-called soldier's substituted additional right was offered at the local land office in lieu of other scrip which had been rejected." The fact will be noted that the issue was whether this rule of property existed prior to March 24, 1906. It was immaterial what the rule and practice were after this date, or indeed after October 4, 1905, when Robinson filed his substituted additional homestead certificate, because then all the rights of the parties against each other had become fixed. The defendant admitted by its answer that such a rule and practice did exist prior to March 24, 1906, but averred that this rule of property did not apply to cases in which there was a junior application pending when the substituted additional certificate was presented. This answer was a confession and avoidance and the

burden was upon the defendant under a familiar rule to prove the avoidance, to prove that cases in which a junior application was pending were excepted from this rule and practice prior to March 24, 1906. In support of this allegation he produced no evidence whatever, no rule, no practice, no decision. On the other hand these facts were established by undisputed evidence: On October 14, 1898, Robeson T. White applied to enter a tract of land upon the additional homestead right of one Carver. Thereupon William Moran applied to enter the same land as a homestead. On October 2, 1899, after the application of Moran had been filed and while both applications were pending, White applied to substitute the additional homestead right of Pugh for that of Carver which he had reason to fear was defective. The Commissioner of the General Land Office, upon consideration of his right so to do, decided that "the instant White signified his election to withdraw his application as the assignee of Winifred Carver, the right of any actual bona fide settler upon the land under the homestead law would attach" and he sustained the claim of Moran. In re Robeson T. White, 30 L. D. 61, 63. It is true, as stated in the opinion of the majority, that White had a preference right of
105 entry when he made his original application to enter the land under the homestead right of Carver. But this preference right of entry was nothing but a right to enter the land by paying for it with an additional homestead, or cash, or other admissible means of payment within thirty days after October 13, 1898. His application to enter and pay for the land with the Carver additional gave him no better right after these thirty days expired, that is to say after November 12, 1898, than Robinson had after he made his original application. 21 Stat. 141, Sec. 2. The right of each to enter depended upon his payment with his additional homestead rights and each was an applicant and not an entryman. Robinson by virtue of his application had as valid a preference right of entry as White had after November 12, 1898.

From the decision of the Commissioner in favor of Moran, White appealed to the Secretary of the Interior and these are the words of Acting Secretary Ryan pertinent to the issue of the rule and practice to substitute a valid for an invalid additional in support of an original application in the face of a junior application:

"It does not appear that White at any time withdrew, abandoned or receded from his original application to enter. Being advised that there was infirmity in proofs of the Carver additional right, he offered to substitute the Pugh right. The intention to claim benefit of and attempt to exercise his preference right, earned by his successful contest of McCrimmon's entry, was the essential part of the transaction. In what manner or by what consideration the government should be satisfied for the land was only matter of incident to the essential and principal thing—the exercise of his preference right of entry. Had, for instance, the transaction been one of private entry on location of a land warrant, scrip, or payment of money, and it transpired that innocently a forged warrant, or scrip, or counterfeit money was paid, the entryman would

be allowed to substitute other good warrants, scrip, or money, without prejudice to his entry.

"Since it has been decided that soldiers' additional rights are simply property, and have lost their personal character, the additional right, as it has reference to acquirement of government land, has, as a logical consequence, become similar in character to a land warrant, scrip or money. It is simply a form of legal consideration to the government for the title to the land entered. It is not of the substance of the transaction that one right or another right, one piece of scrip or another piece of like scrip be surrendered as the consideration for the entry, so only as a legal consideration some valid additional right is surrendered. * * *

"The offer to locate the Pugh right on the land was not inconsistent with claiming the land by location of the Carver right thereon. Having two rights, White could claim the land under either. If he had reason to apprehend infirmity in one right located on the land, White could properly reinforce or cure his entry by locating another right thereon. As, however, it appears White was moved to locate the second right on the land by errors of the
106 Land Department in the matter of Carver's entries, he should be permitted to withdraw his Pugh right, if it be true, as appears by the record now, that the Carver right was good.

"Your office decision is therefore reversed, the order for hearing vacated, and White will be permitted to protect his preference right and entry thereunder by location on the land of the Pugh right, or any valid additional right, if it should prove to be necessary so to do."

Here was a junior application in favor of which the Commissioner had decided this case and here was the decision of the Secretary of the Interior that if the first additional homestead right proved defective, the Pugh additional homestead right which was presented subsequent to the junior application might be substituted to sustain the original and to defeat the junior claim. This determination of the Secretary seems to me to be proof conclusive that on June 9, 1900, when that decision was rendered, cases wherein there were junior applications pending were not excepted from the rule and practice of substitution which was admitted by the answer to prevail.

But this is not all. On February 8, 1905, the Commissioner of the General Land Office in answer to this question, "Where a person who has a pending soldier's additional application for a tract of land becomes convinced that the right or scrip is bad, applies to substitute another piece of same kind of scrip, to-wit: soldier's additional, should be received and transmit such scrip or reject it", wrote the Register and Receiver who asked it:

"The answer to this question is provided for in the case of Robeson T. White (30 L. D., 64), where it is held in effect that an applicant under Section 2306, R. S., may after due notice that a soldier's additional right, upon which his application is based, is for any reason illegal or invalid, substitute another soldier's additional application as a basis for his original application without waiving any rights acquired by virtue of such original application.

"Referring to your question as to the proper procedure in the case of a relinquishment of a soldier's additional application, after the basis has been declared invalid, and the filing of a new application accompanied by a substituted basis, I will state the situation as follows:

"Where the office holds for rejection an application because of a defective base and the applicant after due notice thereof, wishes to retain his rights under his original application, he need not file a new application (Robeson T. White, 30 L. D., 61, supra), but all that is required to preserve his rights under his original application is to file within the time allowed under the rules a substituted basis of the same character as that originally presented which act will be accepted as a waiver by the applicant of all rights asserted under the original basis and be sufficient to warrant you in immediately forwarding said substituted basis to this office after making proper notations upon your records.

107 "The office will thereupon take up this substituted basis, and consider it in place of the one theretofore filed."

Let the facts be noted that there was no exception of cases in which there are junior applications pending in these declarations of the established rule and practice, and that the declarations expressly state that they rest on the rule and practice declared in White's case in which there was a junior application.

On July 19, 1905, the Commissioner of the General Land Office affirmed and applied this rule of property to another case where the substituted additional homestead right was tendered after a junior application had been filed in the case of Charles P. Maginnis. Maginnis had applied to enter the land on October 24, 1899, upon the additional homestead right of Davis. On January 14, 1905, this homestead right was held to be defective and rejected. On April 14, 1905, the Northern Pacific Railway Company selected the land under its grant. On May 19, 1905, Maginnis applied for an extension of time to file a substitute additional homestead certificate for that of Davis and the Commissioner granted the request and said:

"In the case of Robeson T. White, 30 L. D. 61, it is held in effect that an applicant under Sec. 2306, R. S., after due notice that a soldier's additional homestead right, upon which his application is based, is for any reason illegal or invalid, may substitute another soldier's additional homestead right as a basis for his original application without waiving any rights acquired by virtue of such original application.

"In accordance with the case of Robeson T. White, supra, and the case of John C. Ferguson (Secretary's decision of October 14, 1904 — unreported), the application of Maginnis serves to protect his rights as against other applicants until such time as the case is closed upon the records of this office, and the tender of the selection of the Northern Pacific Ry. Co. for said tract can confer no right upon the company as against this applicant, but serves to protect it against others.

"The facts presented as reason for an extension of time in which

to file a substituted right are deemed sufficient to warrant granting the request.

"You are therefore directed to notify applicant and also his said attorney that he will be allowed thirty days from this date in which to file a substituted right."

The decisions and declarations which have now been recited constitute all the evidence that was produced in this case upon the issue of the prevailing rule and practice on October 4, 1905, when Robinson filed his substituted additional and secured his right to this land. They seem to me to demonstrate the fact that the rule and practice that an original application might be supported by a substituted additional homestead right and that such an application so supported gave to the applicant a preference right to enter the land over a junior applicant who presented his application before the substitution had been declared and followed in every case and instruction in which the question had arisen for more than five years prior to October 4, 1905, and there had been no decision, declaration, instruction, or suggestion to the contrary. In accordance with this rule and practice Robinson's substituted additional, that of Heath, which was filed on October 4, 1905, was accepted by the Commissioner and he directed the local land officers to allow him to enter the land on February 15, 1906, and on March 2 of that year he entered the land, paid the final fee and commissions due upon the entry and the usual final certificate was issued to him. Because these acts and decisions of the officers accorded with the settled rule and practice of the Land Department in existence when Robinson filed his original application and when he filed his substituted additional homestead right and when he made his final entry and received his final certificate, I am of the opinion that he thereby acquired an equitable title to this land superior to that of the Santa Fe Company, that the subsequent acts and decisions of the officers of the Land Department which deprived him of this equitable title and patented the land to the Company constituted a plain error of law and that he is entitled to a correction of this error and to a decree in his favor to the effect that the defendant below holds the title under the patent in trust for him.

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From this conclusion there seems to me to be no logical escape without overruling the decision of this court in Germania Iron Company v. James, 89 Fed. 811, 817, 32 C. C. A. 348, 354, to the effect that the rights of applicants for public lands between themselves are to be determined by the rule of property evidenced by the settled rule and practice of the Land Department at the time when their rights accrue, and not by some new and contrary rule which the officers afterwards adopt. It is true that after Robinson had entered his land, paid for it and received his final certificate in accordance with the established rule of property which had existed for more than five years prior to the entry and on March 24, 1906, upon an appeal from the decision of the Commissioner which has been recited in the case of Maginnis, the Acting Secretary of the Interior reversed the rule of property which had theretofore always prevailed and established the new and contrary rule that a junior application

should prevail over a senior application supported by a substituted additional homestead right. But in my opinion that decision and the subsequent rule are not material to this case because it ought to be governed by the rule of property in force when the rights of the respective parties attached. By that rule when the Santa Fe Company filed its application to select this land on July 11, 1905, it acquired no right to it as against Robinson's right under his prior application which he had [illegible]egal right to sustain and enforce by his substituted additional [illegible]mestead right of Heath. There was no reversal or suggestion of variation of that rule until the decision in the Maginnis case on March 24, 1906, after Robinson had
109 entered and paid for the land according to the law and the settled rule and practice as they then and always theretofore existed.

The suggestion is made that the officers of the Land Department had no power to establish the rule and practice of giving to an applicant a short time after his additional homestead right was found to be defective to provide a valid additional homestead right in lieu of it or to receive the latter in support of his original application in the face of a junior claim. But ample authority to establish and maintain this rule and practice may be found in Sections 441, 453 and 2306, of the Revised Statutes, and striking illustrations of the exercise of like powers by those officers in Copp's Public Land Laws, 1875, page 186; Copp's Public Land Laws, Ed. 1882, pages 478-9; Geneal Circular of 1904, page 238 and Rule 41, Circular of July 20, 1875, cited in Hussman v. Durham, 165 U. S. 144, 146.

On the other hand the officers of the Land Department were without the power to divest Robinson of his title to this land after he had entered it. His filing of his application, his substitution of the Heath additional for the defective Carroll certificate, his entry and payment for the land and his receipt of his final certificate were each and all in strict accord with the law and the settled rule and practice of the Department which were then in existence, and the power of the officers of the Land Department does not extend to the taking of property lawfully entered by one applicant and the giving of it to another. "It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property, and a right to a patent therefor, and can no more be deprived of it by the order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it." Cornelius v. Kessel, 128 U. S. 456, 461, 9 Sup. Ct. 122; Bogan v. Mortgage Co., 11 C. C. A. 128, 130, 63 Fed. 192, 195; German Iron Company v. James, 89 Fed. 811, 816-18, 32 C. C. A. 348, 353-55; Ballinger v. U. S.—Sup. Ct. Rep.—, filed Feb. 21, 1910. For the reasons which have now been stated, perhaps at too great length, it appears to me that the decree below should be reversed and a decree for the complainant for the relief prayed in his bill should be granted.

Filed March 23, 1910.

110 (*Decree.*)

And on the twenty-third day of March, A. D. 1910, in the record of the proceedings of said Circuit Court of Appeals is a decree in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1909.

No. 3171.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Appellants,
vs.
JOHN E. LUNDRIGAN.

Appeal from the Circuit Court of the United States for the District of Minnesota.

WEDNESDAY, March 23, 1910.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that John E. Lundrigan have and recover against John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan the sum of twenty dollars for his costs herein and have execution therefor.

March 23, 1910.

(*Petition for and Order Allowing Appeal to Supreme Court U. S.*)

And on the sixth day of July, A. D. 1910, a petition for and order allowing an appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

111 No. 3171. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY and B. C. FINNEGAN, Appellants,
vs.
JOHN E. LUNDRIGAN, Appellee.

Now come the above named appellants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, and being

grieved by the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, entered in the above entitled action on the 23rd day of March, A. D. 1910, do hereby respectfully petition that their appeal from such judgment and decree may be allowed; and they do hereby appeal from such judgment and decree, to the Supreme Court of the United States.

Dated June 14, 1910.

C. D. O'BRIEN,
P. H. SEYMOUR,
Counsel for Appellants.

ST. PAUL, MINN., *July* 5, 1910.

The appeal to the Supreme Court of the United States as above prayed is hereby allowed.

WILLIS VAN DEVANTER,
Presiding Judge of the U. S. Circuit Court of Appeals, Eighth Circuit.

[Endorsed:] Original. U. S. Circuit Court of Appeals, Eighth Circuit. No. 3171. December Term, A. D. 1909. John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Appellants, vs. John E. Lundrigan, Appellee. Petition for Appeal and order allowing same. Filed Jul- 6, 1910, John D. Jordan, Clerk. C. D. O'Brien & P. H. Seymour, Counsel for Appellants.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And on the sixth day of July, A. D. 1910, an assignment of errors on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

112 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3171. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY, and B. C. FINNEGAN, Appellants,
vs.
JOHN E. LUNDRIGAN, Appellee.

Now come the appellants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, in the above entitled cause, and file the following assignments of error upon which they, and each of them will rely in their appeal from the decree of this Honorable Court, entered on the 23rd day of March, A. D. 1910, in said cause.

I. That said Court erred in directing and entering a decree in said cause in favor of the appellee John E. Lundrigan, and against the appellants, John E. C. Robinson, John Beckfelt, George A.

Fay, and B. C. Finnegan, and awarding to said appellee the costs in said cause.

2. That said Court erred in not directing and entering a decree in favor of said appellants, and against said appellee.

3. That said Court erred in its decree that the said appellants have no right, title or interest in and to the land described in the bill of complaint herein, to-wit:

That Southwest quarter of the Southeast Quarter (SW. ¼ of SE. ¼) of Section Thirteen (13), Township Fifty-five (55) North, Range Twenty-six (26) West of the Fourth Principal Meridian, located in the County of Itasca, State of Minnesota.

4. That said Court erred in its decree that the appellee, John E. Lundrigan is the owner of the fee simple of the above described premises, free and clear of any right, claim or demand upon the part of the appellants, or any of them.

5. That said Court erred in not deciding that appellants are the equitable owners of the above described premises, and that said appellee holds the legal title thereof as trustee for said appellants.

6. That said Court erred in not ordering, adjudging and
113 decreeing that said appellee John E. Lundrigan should convey the legal title to said described premises, to the appellants, as prayed for in the bill of complaint herein.

7. That said Court erred in not finding and deciding that the application of appellant John E. C. Robinson, made January 24, 1901, to enter said described premises under the provisions of Section 2306, R. S., as assignee of one James Carroll, segregated the same and removed it from liability to other disposal, during the pendency of said application.

8. That said Court erred in not deciding that the substitution by said appellant, John E. C. Robinson of the soldiers' additional homestead right of one Justus F. Heath, for that of James Carroll on October 4, 1905, related to and became effective as of the date of said Robinson's application to enter, made January 24, 1901, to the exclusion of all other applications made subsequent thereto.

9. That said Court erred in not finding and deciding that said substitution was made by authority of the Land Department of the United States.

10. That said Court erred in not finding and deciding that said substitution was made and allowed in accordance with the rule, regulations and settled practice of said Land Department in force at the time thereof, as well as the date of said appellant's application of January 24, 1901.

11. That said Court erred in not finding and deciding that said rule, regulation and settled practice of the Land Department constituted a rule of property, under which the rights of appellants vested.

12. That said Court erred in not deciding that the said Land Department had no authority to disturb rights acquired in accordance with the rules, regulations and settled practice in force at the time, by the retroactive application of a different rule and regulation subsequently adopted.

13. That said Court erred in not finding and deciding that the

issuance of the patent of the United States to the Santa Fe Railroad Company, was in derogation of the prior rights of appellant, John E. C. Robinson and his assigns, and operated only to vest in said patentee, and its assigns, the legal title to the described prem-
114 ises as trustee for the appellants.

14. That said Court erred in not reversing the judgment and decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, and in not finding and decreeing judgment and decree in favor of the appellants.

Wherefore the appellants, John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan pray that said decree of the Circuit Court of Appeals of the United States for the Eighth Circuit, in the above entitled cause, may be reversed.

C. D. O'BRIEN,
P. H. SEYMOUR,
Solicitors for and of Counsel for Appellants.

(Endorsed:) Original. U. S. Circuit Court of Appeals, Eighth Circuit. No. 3171. December Term, A. D. 1909. John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Appellants, vs. John E. Lundrigan, Appellee. Assignments of Error. Filed Jul. 6, 1910, John D. Jordan, Clerk. C. D. O'Brien & P. H. Seymour Counsel for Appellants.

(*Bond on Appeal to Supreme Court U. S.*)

And on the sixth day of July, A. D. 1910, a bond on appeal to the Supreme Court of the United States was filed in said cause, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3171. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY, and B. C. FINNEGAN, Appellants,
vs.
JOHN E. LUNDRIGAN, Appellee.

Know all men by these Presents, That we, John E. C. Robinson, John Beckfelt, George A. Fay, and B. C. Finnegan, as principals, and D. M. Gunn, and W. C. Gilbert, of Grand Rapids, Itasca County, Minnesota, as sureties, are held and firmly bound
115 unto John E. Lundrigan, in the full and just sum of One Thousand ($1000.00) Dollars, to be paid to the said John E. Lundrigan, his heirs, executors, administrators or assigns, for which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this 18th day of June, A. D. 1910.

Whereas lately, at the December Term of the United States Circuit Court of Appeals for the Eighth Circuit, in a suit pending in said court between John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, the above bounden principals, as appellants, and John E. Lundrigan, as appellee, judgment and decree was rendered against said appellants, and the said appellants have taken an appeal to the Supreme Court of the United States, to reverse said judgment and decree in the aforesaid suit; and a citation directed to the said John E. Lundrigan, citing and admonishing him to be and appear in the Supreme Court of the United States, at the City of Washington, in the District of Columbia, thirty (30) days from and after the date of said Citation:

Now therefore, the condition of the above obligation is such, that if the said John E. C. Robinson, and said other principals, shall prosecute said appeal to effect, and answer all damages and costs, if they fail to make good their said appeal, then this obligation to be void, otherwise to remain in full force and virtue.

JOHN E. C. ROBINSON. [SEAL.]
JOHN BECKFELT. [SEAL.]
GEO. A. FAY, [SEAL.]
B. C. FINNEGAN. [SEAL.]
D. M. GUNN, [SEAL.]
W. C. GILBERT. [SEAL.]

Signed, Sealed and Delivered in Presence of

GEO. G. MAGNUSEN,
HILDA LARSON,
As to John E. C. Robinson.
J. A. DAVIS,
O. T. ANDERSON,
As to Beckfelt, Finnegan, Gunn & Gilbert.
F. A. KING,
W. H. CRAGO,
FRANK C. CARLSON,
As to George A. Fay.

116 STATE OF MINNESOTA,
County of Stearns, ss:

On this 27 day of June, A. D. 1910, before me, a notary public, within and for said county, personally appeared John E. C. Robinson, to me known to be the person described in, and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.] JOHN I. DONOHUE,
Notary Public, Stearns County, Minnesota.

My Commission expires May 5, 1913.

STATE OF MINNESOTA,
County of Itasca, ss:

On this 18th day of June, A. D. 1910, before me, a notary public within and for said county, personally appeared John Beckfelt, B. C. Finnegan, D. M. Gunn and W. C. Gilbert, to me known to be the persons described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same as their free act and deed.

[SEAL.]

FRED A. KING,
Notary Public, Itasca County, Minnesota.

My commission expires April 15, 1917.

STATE OF MINNESOTA,
County of St. Louis, ss:

On this 25 day of June, A. D. 1910, before me, a notary public within and for said county, personally appeared George A. Fay, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that he executed the same as his free act and deed.

[SEAL.]

J. T. MELVIN,
Notary Public, St. Louis County, Minnesota.

My Commission expires 12/19, 1910.

117 STATE OF MINNESOTA,
County of Itasca, ss:

D. M. Gunn and W. C. Gilbert, being duly sworn, each for himself, doth depose and say that he is the person named in and who executed the foregoing instrument, that he is a resident and freeholder of the state of Minnesota, and worth the sum of One Thousand ($1000.00) Dollars over and above his debts and liabilities, and exclusive of his property exempt from execution.

D. M. GUNN.
W. C. GILBERT.

Subscribed and sworn to before me this 18th day of of June, A. D. 1910.

[SEAL.]

FRED A. KING,
Notary Public, Itasca County, Minnesota.

My commission expires April 15, 1917.

The within bond and sureties therein are hereby approved, this 5 day of July, A. D. 1910.

WILLIS VAN DEVANTER,
Presiding Judge of the U. S. Circuit Court of Appeals, Eighth Circuit.

(Endorsed:) Original. U. S. Circuit Court of Appeals, Eighth Circuit. No. 3171. December Term, A. D. 1909. John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Ap-

pellants, vs. John E. Lundrigan, Appellee. Bond on Appeal. Filed Jul- 6, 1910, John D. Jordan, Clerk. C. D. O'Brien & P. H. Seymour, Counsel for Appellants.

(Citation on Appeal to Supreme Court U. S.)

And on the ninth day of July, A. D. 1910, a citation on appeal to the Supreme Court of the United States was filed in said cause, the original of which with acknowledgement of service endorsed thereon is hereto attached and herewith returned:

118 United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1909.

No. 3171. In Equity.

JOHN E. C. ROBINSON, JOHN BECKFELT, GEORGE A. FAY, and B. C. FINNEGAN, Appellants,
vs.
JOHN E. LUNDRIGAN, Appellee.

The United States of America, to John E. Lundrigan, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States, at the city of Washington, in the District of Columbia, thirty (30) days from and after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals, for the Eighth Circuit, wherein John E. C. Robinson, John Beckfelt, George A Fay and B. C. Finnegan are appellants, and you are appellee, to show cause, if any there be, why the decree rendered against said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Willis Van Devanter, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 5th day of July, A. D. 1910.

WILLIS VAN DEVANTER, *Judge.*

Service of the within and foregoing citation, by copy is acknowledged this 7" day of July 1910.

WM. E. CULKEN AND
L. C. HARRIS,
Attorneys and Solicitors for Appellee, John E. Lundrigan.

[Endorsed:] Original. U. S. Circuit Court of Appeals, Eighth Circuit. No. 3171. December Term, A. D. 1909. John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan, Appellants, vs. John E. Lundrigan, Appellee. Citation. Filed Jul- 9 1910. John D. Jordan, Clerk. C. D. O'Brien & P. H. Seymour, Counsel for Appellants.

119 *(Clerk's Certificate.)*

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause in said Court wherein John E. C. Robinson, John Beckfelt, George A. Fay and B. C. Finnegan are Appellants and John E. Lundrigan is Appellee, No. 3171, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

I do further certify that on the seventh day of June, A. D. 1910, a mandate was issued out of said United States Circuit Court of Appeals in said cause, directed to the Judges of the Circuit Court of the United States for the District of Minnesota.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twelfth day of July, A. D. 1910.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 22,271. U. S. Circuit Court Appeals, 8th Circuit. Term No. 108. John E. C. Robinson, John Beckfelt, George A. Fay, and B. C. Finnegan, appellants, vs. John E. Lundrigan. Filed July 21st, 1910. File No. 22,271.

INDEX TO BRIEF.

CASES CITED.

IN THE

Supreme Court of the United States

No. 108.

JOHN E. C. ROBINSON, et al., Appellants,

vs.

JOHN E. LUNDRIGAN, Appellee.

Appeal from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR APPELLANTS.

STATEMENT.

On January 24, 1901, Robinson, one of the appellants, filed with the Register and Receiver of the U. S. Land Office, at Cass Lake, Minnesota, his application to enter, pursuant to the provisions of Section 2306, Rev. Stats., as assignee of James Carroll, the tract in controversy, to-wit: The southwest quarter of the southeast quarter (SW¼ of SE¼) of Section thirteen (13), Township fifty-five (55) North, Range twenty-six (26), West of the 4th P. M., said land being at that time unappropriated public land of the United States. With the application were submitted affidavits showing *prima facie* Carroll's right to an entry under said section, and his assignment thereof.

This application was noted upon the plat and tract books of the local land office, and, with the assignment and accompanying proofs, then transmitted to the general land office in accordance with the rule then in force.

March 28, 1904, the Commissioner of the General Land Office notified the land officers at Cass Lake that the proofs of Carroll's right as a beneficiary of said section 2306, Rev. Stats., were not satisfactory, and allowed Robinson to show cause why his application should not be rejected. Comp. Ex. 3, p. 33.

January 28, 1905, a hearing was directed to be had to allow Robinson an opportunity to show the validity of the Carroll right. Comp. Ex. 4, p. 34.

The hearing was accordingly ordered and notice of trial to be had June 29, 1905, was issued. (P. 34.) Robinson failed to appear or submit evidence and on July 15, 1905, the Register and Receiver rendered decision finding that Carroll, the assignor, did not possess the qualifications which would entitle him to an entry under Sec. 2306, Rev. Stats., and recommending the rejection of Robinson's application to enter. (Pp. 36-37).

July 27, 1905, within the time allowed for that purpose, Robinson filed at the local land office an appeal from the last mentioned decision, wherein he asked that he be allowed thirty days within which to "re-scrip" the land, and that the decision of the Register and Receiver be amended so as to grant him a reasonable time within which to perfect his entry. (Pp. 38-39).

August 29, 1905, the Commissioner of the General Land Office, directed said land officers to notify Robinson that he was allowed thirty days from notice within which to file a proper substitute for the additional homestead right of Carroll. (Pp. 39-40).

October 4, 1905, within the time allowed, Robinson filed such substitute, to-wit: The assigned additional homestead right of Justus F. Heath. (P. 42).

February 15, 1906, the Commissioner of the General Land office accepted this substitute and directed the allowance of entry upon the payment of the legal fees and commissions. (P. 43).

March 2, 1906, Robinson paid said fees and commissions and final certificate of entry, No. 715, Cass Lake, Minn., series, was issued to him. (P. 44).

July 11, 1905, after the date of the hearing at which Robinson failed to appear, and prior to the decision of the Register and Receiver of July 15, 1905, the Santa Fe Pacific Railroad company, by John E. Lundrigan, attorney-in-fact, applied to select the same land under the act of June 4, 1897, commonly known as the "Forest Reserve" act. This application was noted upon the tract book of the land office, with the memorandum "Subject to S. A. App." (Ex. 1, p. 37—Paster between pages 30 and 31).

Upon the issuance of the final certificate to Robinson, the local land officers rejected the application of the railroad company, which appealed from their action.

June 14, 1906, the Commissioner of the General Land Office rendered a decision upon said appeal, holding that the company's application to select constituted an intervening adverse claim and a bar to the substitution made by Robinson, basing said decision upon one rendered by the Honorable Secretary of the Interior, March 26, 1906, in the case of Maginnis, assignee of Davis. (Comp. Ex. 23, pp. 53-54). He accordingly held for cancellation the final certificate issued to Robinson. (Comp. Ex. 17, pp. 44-45-46).

February 25, 1907, upon appeal by Robinson, the Secretary of the Interior affirmed said last mentioned decision (Comp. Ex. 18, pp. 46-47), and March 18, 1907, denied a motion for review. (Comp. Ex. 19, pp. 48-49).

May 18, 1907, in accordance with said decision of the Secretary, the Commissioner of the General Land Office, canceled Robinson's entry. (Comp. Ex. 20, pp. 49-50).

July 15, 1907, petition for re-review by Flanigan, a grantee of Robinson, and one of the appellants, was denied by the Secretary. (Comp. Ex. 21, pp. 50-51).

July 20, 1908, the patent of the United States was issued to said Santa Fe Pacific Railroad company for the tract applied for and entered by Robinson. (Comp. Ex. 22, p. 52-53).

Thereupon, to-wit: November 9, 1908, appellants filed their bill of complaint against said railroad company and John E. Lundrigan in the United States circuit court for the District of Minnesota, Fifth Division, alleging the matters hereinabove recited. It was further alleged that the decision of the Secretary of the Interior was contrary to law, and was due to a mistake or misconstruction of law in this, that the land in question was not at any time freed from appropriation by Robinson's application of January 24, 1901, and was not at any time thereafter subject to selection by any other person or corporation.

The bill further alleged that prior to March 24, 1906, and on and prior to January 24, 1901, there was in force in the Department of the Interior, a rule and regulation, and a settled practice, providing and declaring that, upon the rejection of a soldier's additional homestead right, surrendered by an assignee thereof in support of an application to make entry of public land under sec. 2306, Rev. Stats., such applicant might substitute in support of his application a valid additional homestead right in lieu thereof, and that no right attached by virtue of any application made for land embraced in the prior application of another until such first application was disposed of. It was further alleged that but for the aforesaid misconstruction of law, and ignoring and violation of the rule, practice and decisions of the department, the application of the railroad company to select would have been held to be invalid and ineffectual because the land was embraced in and subject to the prior application of Robinson, and that Robinson was in law and fact entitled to receive the patent of the United States therefor.

The answer of defendant, Londrigan, admitting most of the allegations of complainants' bill, denies that Robinson on July 27, 1905, filed an application for leave to substitute for the invalid homestead right of Carroll, but admits that he filed an application to be allowed thirty days within which to "re-scrip" the land.

It denies that the decisions of the Secretary of the Interior referred to were contrary to law, or were due to mistake or misconstruction of the law applicable to such cases, and alleges that said decisions were in accordance with the statutes of the United States, and with the decisions and rules of the Department of the Interior.

It alleges that under the law, and under the rules and decisions of the department, the application of the railroad company became effective to take and enter said land upon the rejection of Robinson's application as assignee of Carroll.

It denies that under the law or under the rules of the department, Robinson, upn the rejection of his application as assignee of Carroll, had the right to re-scrip the land or to substitute another and valid additional homestead right therefor, so as to adversely affect the intervening right obtained by the railroad company, and alleges that the privilege to Robinson to substitute was subject to any valid adverse application pending at the time the application for the location of the additional right of Carroll was rejected.

It admits there was a rule and practice prevailing prior to January 24, 1906, that upon the rejection of a soldier's additional homestead right to make entry, the applicant might apply for and enter the land with another valid additional right, but alleges that such rule and practice was limited to those cases where no other adverse right was pending at the time such substitution was offered.

After due hearing the decree of the circuit court, entered September 8, 1909, was that complainants' bill be

dismissed, and adjudging that defendant, Lundrigan, was the owner in fee simple of the land described in the bill, free and clear of any right, claim or demand upon the part of complainants.

Complainants duly appealed from said decree to the United States Circuit Court of Appeals for the Eighth Circuit. That court affirmed the decree of the lower court in an opinion filed March 23, 1910 (Record, p. 81). A dissenting opinion was filed by Mr. Sanborn, Circuit Judge, (Record, p. 88).

In support of their appeal to this court from the decree of the Circuit Court of Appeals, appellants filed the following

SPECIFICATIONS OF ERROR.

1. That said court erred in directing and entering a decree in said cause in favor of the appellee, John E. Lundrigan, and against the appellants, John E. C. Robinson, John Beakfelt, George A. Fay, and D. C. Finnegan, and awarding to said appellee the costs in said cause.

2. That said Court erred in not directing and entering a decree in favor of said appellants, and against said appellee.

3. That said Court erred in its decree that the said appellants have no right, title or interest in and to the land described in the bill of complaint herein, to-wit:

The Southwest quarter of the Southeast quarter (SW¼ of SE¼) of Section Thirteen (13) in Township Fifty-five (55) North, Range Twenty-six (26) West of the Fourth Principal Meridian, located in the County of Itasca, State of Minnesota.

4. That said Court erred in its decree that the appellee, John E. Lundrigan, is the owner of the fee simple of the above described premises, free and clear of any right, claim or demand upon the part of appellants, or any of them.

5. That said Court erred in not deciding that appellants are the equitable owners of the above described premises, and that said appellee holds the legal title thereof as trustee for said appellants.

6. That said Court erred in not ordering, adjudging and decreeing that said appellee, John E. Landrigan, should convey the legal title to said described premises to the appellants, as prayed for in the bill of complaint herein.

7. That said Court erred in not finding and deciding that the application of appellant, John E. C. Robinson, made January 24, 1901, to enter said described premises under the provisions of section 2306, R. S., as assignee of one James Carroll, segregated the same and removed it from liability to ther disposal during the pendency of said application.

8. That said Court erred in not deciding that the substitution by said appellant, John E. C. Robinson, of the soldier's additional homestead right of one Justus F. Heath, for that of James Carroll on October 4, 1905, related to and became effective as of the date of said Robinson's application to enter, made January 24, 1901, to the exclusion of all other applications made subsequent thereto.

9. That said Court erred in not finding and deciding that said substitution was made by authority of the Land Department of the United States.

10. That said Court erred in not finding and deciding that said substitution was made and allowed in accordance with the rule, regulations and settled practice of said Land Department in force at the time thereof, as well as (at) the date of said appellants' application of January 24, 1901.

11. That said Court erred in not finding and deciding that said rule, regulation and settled practice of the Land Department constituted a rule of property, under which the rights of appellants rested.

12. That said Court erred in not deciding that the said Land Department had no authority to disturb rights acquired in accordance with the rules, regulations and settled practice in force at the time, by the retroactive application of a different rule and regulation subsequently adopted.

13. That said Court erred in not finding and deciding that the issuance of the patent of the United States to the Santa Fe Railroad Company was in derogation of the prior rights of appellant, John E. C. Robinson and his assigns, and operated to vest in said patentee and its assigns the legal title to the described premises as trustee for the appellants.

14. That said Court erred in not reversing the judgment and decree of the Circuit Court of the United States for the District of Minnesota, Fifth Division, and in not finding and decreeing judgment and decree in favor of the appellants.

ARGUMENT.

It clearly appears from the facts recited in the statement, as to which there is no dispute, that when Robinson in January, 1901, applied for the tract of land in controversy it was unappropriated public land of the United States open to disposal and free from any adverse claim or right. It further appears that the application of the Santa Fe Company was tendered while the rights of Robinson were in course of adjudication by the Land Department; that it was merely recorded and noted upon the tract book at the land office as being subject to Robinson's application; that the Commissioner of the General Land Office recognized Robinson's prior right in consequence of which final certificate of entry was issued to him, and the application of the railroad company rejected. It was upon an appeal from this rejection that the Land Department reversed its former action; canceled the final certificate issued to Robinson, and issued patent to the railroad company.

The questions, therefore, presented by this record for final determination are:

1. Did the Land Department authorize the substitution by Robinson of a valid soldier's right for that of Carroll?

2. If so, was such authorization pursuant to a rule, regulation and settled practice in force at the time?

3. Was the adoption of such a rule within the power of the Land Department?

I.

Before the expiration of the time within which Robinson was allowed to appeal from the decision of the register and receiver finding that Carroll was not entitled to a soldier's right of entry under section 2306 R. S., he filed what he termed an appeal, asking to be given thirty days within which to "re-scrip" said above mentioned tract, "and that the decision of the register and receiver be amended so as to give (him) a reasonable time within which to perfect said entry." (Comp. Ex. 10, p. 38.) This was not a petition to make a new application for the land, for which no request or authority was necessary because such an application would have been received and noted upon the records when offered subject to intervening rights, if any. It was, as its language shows, a petition to perfect his application by the substitution of another soldier's right for the one which was found objectionable.

The Commissioner of the General Land Office so understood it, and granted the petition. He directed the local land offices, under date of August 29, 1905, to "notify the applicant that he will be allowed thirty days from notice hereof in which to file a *proper* substitute for the *right* hereby rejected." He further instructed those officers that "if at the expiration of the said period the applicant has not filed such substitute" * * "to hold the said tract subject to entry from that time by the first qualified applicant." Ex. 11, pp. 39-40.

This action of the Land Department is clear and unmistakable as to its effect and purpose. In directing that Robinson be required to file a proper substitute within a certain time, it recognized his right, if duly exercised to do so, and in directing that the land be subject to entry after the limited time, upon failure of Robinson to act, it recognized as an existing fact, under the law and regulations as applied to such cases, that Robinson's application preserved his rights from intrusion by subsequent applicants; and that he only was to be considered until a final determination with respect thereto should have been reached. This decision, or more properly these instructions of the Commissioner of the General Land Office, addressed to the register and receiver at St. Cloud, Minn., forcibly answers the first question submitted in the affirmative.

II.

Robinson, on October 4, 1905, having surrendered assignment and proofs of the soldier's right of Justus F. Heath, it was transmitted to the General Land Office, where action was had under date of February 15, 1906. (Corrp. Ex. 15, p. 43). In his letter of that date the Commissioner said "this application is a substitute for another for the same land which has been finally closed," and directed issuance of original and final receipts and final certificate of entry after payment of the legal fees and commissions.

This action, together with that which authorized the substitution to be made, show that such was the settled practice in like cases. The language of the letters shows that the word "substitution" was used to indicate a recognized and accepted proceeding.

The application of the Railroad Company, filed July 11, 1906, was junior to that of Robinson, which was still pending and in course of adjudication. A junior applicant, the Land Department has held consistently acquires no right until the first application is disposed of; that such

disposition is a matter lying solely between the first applicant and the government, and that the only right acquired by a junior applicant is that of being preferred over other applicants after him, should the first application be finally rejected.

Jerry Watkins, 17 L. D. 148.

Berry v. Towner, 21 L. D. 434.

In the case of the California and Oregon Land Co. the Secretary of the Interior held that a pending school selection invalid for want of proper base, was nevertheless a bar to other entry. He said:

> "Such practice to prevent interference with matters pending before the land department for determination of rights in controversy between the United States and persons seeking under the law to appropriate public land, would manifestly greatly prejudice public interests in economical administration, and also greatly injure those seeking to appropriate public lands by delays due to vexatious claims of right founded upon some supposed defect in the proceedings of the first applicant. The evils of such practice would be intolerable." 33 L. D. 595, p. 598.

It was not, therefore, incumbent upon the Land Department in reaching a final determination respecting Robinson's application to inquire whether there was or was not a junior application on file. That inquiry would only have become necessary had it been finally rejected. That Robinson's application to enter was finally rejected when the soldier's additional right of Carroll was declared invalid is the contention of appellee, seemingly concurred in by the court below, but this position loses sight of the fact that Robinson *before* his application was finally rejected, applied for, and was granted, leave to substitute. In making such substitution he need not have filed with it a new application to enter, and that he did so in no manner abridged his right under his original application. It was simply superfluous and unnecessary.

A homestead entry of public land, no matter upon what false affidavits it may be founded is, so long as it

remains of record, an absolute segregation of the land embraced in it.

Germania Iron Co. v. James, 89 Fed. 811.

Hastings & Dakota R. R. Co. v. Whitney, 132 U. S. 357.

McMichael v. Murphy, 197 U. S. 304.

A soldier's additional homestead entry under the original regulations for the administration of the law (Sec. 2306 R. S.) was in like manner an absolute segregation. It was first provided by the Land Department that an applicant for entry under Sec. 2306 should apply to the proper local land office, make affidavit that he had performed the necessary military service, and had prior to June 22, 1874, made an original homestead entry of less than 160 acres, whereupon his entry, not exceeding in quantity an area which, with his original entry, would equal 160 acres, such proofs being satisfactory to the local land officers, should be allowed. General Circular June 17, 1875. (Copp's Public Land Laws, Ed. 1876, p. 186.)

In May, 1877, it was required that parties claiming to be entitled to such rights should present their proofs to the Commissioner of the General Land Office, when, if found satisfactory, they would be returned to the party with a certificate, recognizing his right to make entry.

Copp's Public Land Laws, Ed. 1882, pp. 478-9.

This regulation, which did not contemplate an application for any specific tract of land in advance of the certification of the right, was revoked by circular instructions of February 12, 1883, and claimants were again required to appear at the local land office, subscribe to an affidavit showing their qualifications and apply for and make entry in the same effect as in case of an original homestead.

1 L. D. 554.

In 1890 a different procedure was adopted, but from the time instructions were first issued in 1875, until this

with the exception of the period between 1877 and 1889, soldiers' additional entries were made and allowed at the local land offices upon application and affidavits then presented in the same manner and to the same effect as entries under the general homestead law. If such an entry should have been procured by means of false affidavits its segregative effect was nevertheless the same as that of any other entry, and it could be removed only by cancellation in the regular manner.

On February 18, 1890, new instructions were issued and were in force until 1908. They were in force when Robinson's application was tendered, and when he was allowed to substitute another additional homestead right for the one first tendered. They were as follows:

> "Where parties apply to make entries under Section 2306, United States Revised Statutes, claiming by virtue of service in the army or navy of the United States during the late civil war, and of having made a homestead entry for less than 160 acres, prior to the 22nd of June, 1874, and the right claimed is not certified by this office, after examination, under circular of May 17, 1877, and the certificate presented to you in support of the claim, I have to direct that before taking final action on the claim you forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendancy of the application, and the consequent segregation of the land, so as to prevent any adverse appropriation before the application is finally acted upon, and await further instructions before taking any further action in the case."

Reprinted in General Circular of 1904, p. 238.

Sierra Lumber Co., 30 L. D. 547, p. 549.

In thus providing that the application when noted upon the records should operate to segregate the land applied for during the time it was pending, the instructions in actual effect went no further than those which they superseded, because, as has been shown, under the earlier instructions the application when based upon affidavits

satisfactory to the register and receiver was allowed as an entry and consequent segregation of the land.

Prior to 1896, the Land Department held the soldiers' additional right to be personal, not assignable, but in that year this court construed the law differently and held that there was no restraint upon the power of alienation. It said, quoting from the opinion of the Circuit Court of Appeals, in Barnes v. Poirier, 57 Fed. 956,

> "The presumption is that Congress intended to make this right as valuable as possible," and that "its real value was measured by the price that could be obtained by its sale."
>
> Luther v. Webster, 163 U. S. 331, p. 341.

In administering the law, as thus construed, the Department has in no manner safe-guarded a purchaser from fraud and deception. He buys in the open market, an assignment of the National homestead right, accompanied by such ex-parte affidavits hereinbefore referred to as sufficient for the making of an entry, and these with his application for a specific tract of land are filed at the local land office, for formal action as specified in the instructions of 1890 (supra). If upon the examination therein provided for, it is found that the claimed right is invalid or insufficiently established, the assignee applicant has no protection in his right to the land desired unless it is provided by those instructions, and by the right to substitute another right in aid of his application.

This matter of "substitution" was not a new thing in the Land Department, but had its origin in the administration of the law regarding the location of military bounty land warrants. Bounty land warrants were issued after proof of the soldier's right thereto first presented to the proper governmental bureau, and in this respect a purchaser had the advantage over the purchaser of a soldier's additional homestead right. Such warrants when tendered for location and received, operated to segregate the land the same as an entry, but were sometimes found to be invalid, or improperly assigned. In such cases the innocent

purchaser and locator was protected by the following rule, viz:

> "When a valid entry is withheld from patent on account of the objectionable character of the warrant located thereon the party in interest may procure the issue of a patent by filing in the office for the district in which the land is situated an acceptable substitute for the said warrant. The substitution must be made in the name of the original locator, and may consist of a warrant, cash, or other kind of scrip legally applicable to the class of lands embraced in the entry."
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> Rule 41, Circular of July 20, 1875, cited in
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> Hussman vs. Berry, 6 L. D. 375, and in
>
> Hussman vs. Durham, 165 U. S., 144.

The Secretary of the Interior, in the case of Robeson T. White, decided June 9, 1900, stated the rule as it has been unquestionably for very many years that in case of a "private entry on location of a land warrant, scrip, or payment of money, and it transpired that innocently a forged warrant, or scrip or counterfeit money was paid, the entryman would be allowed to substitute other good warrant scrip or money, without prejudice to his entry." He then added:

> "Since it has been decided that soldiers' additional rights are simply property, and have lost their personal character, the additional right, as it has reference to acquirement of government land, has as a logical consequence, become similar in character to a land warrant, scrip or money. It is simply a form of legal consideration to the government for the title to the land entered. It is not of the substance of the transaction that one right or another right, one piece of scrip or another piece of like scrip, be surrendered as the consideration for the entry, so only as a legal consideration some valid additional right is surrendered."
>
> 30 L. D. 61, p. 63.

In the case of John C. Ferguson, decided by the Secretary of the Interior October 14, 1904, (unreported) it

appears from the statement that McBean presented an application to enter under Sec. 2306, as assignee of one Ellis. The commissioner rejected the application for the reason that the service of Ellis was insufficient as a basis on which to found such additional right. McBean appealed, and pending action thereon Ferguson applied for the same land. The register of the land office rejected the latter application, and this action was affirmed by the General Land Office, upon authority of the instructions of 1890. The rejection of McBean's application was affirmed on appeal by the Secretary. It does not appear that McBean offered to substitute a valid right for that of Ellis. The Secretary held that the most McBean's application can be held to have done, was to protect any right that he might have as against other applicants, or that it was equivalent to an entry only so far as his rights were concerned, and that therefore there was no good reason why the application of Ferguson should not have been held to await that of McBean.

Comp. Ex. 27, pp. 60-61.

This decision does not go so far as to hold that McBean could not have protected himself by an offer to substitute. Nor does it hold that the intervening applicant acquired any right to be considered until McBean's application was disposed of. It modified the former instructions to the extent of permitting junior application to be received subject to final action upon the senior. This was made clear in the letter of the Commissioner of the General Land Office dated February 8, 1905, in response to the inquiries of the land officers at Duluth, Minnesota, as to the effect of the Ferguson decision. He said:

"With respect to your next question:

"'Where a person who has a pending soldiers' additional application for a tract of land becomes convinced that the right or 'scrip' is bad, applies to substitute another piece of the same kind of scrip, to-wit: soldiers' additional, should we receive and transmit such scrip or reject it.'

"The answer to this question is provided for in the case of Robeson T. White (30 L. D. 64), where it was held in effect that an applicant under section 2306, R. S., may after due notice that a soldiers' additional right, upon which his application is based, is for any reason illegal or invalid, substitute another soldier's right as a basis for his original application, without waiving any rights acquired by virtue of such application."

He then proceeded to state that a new application need not be filed with the substituted base; that the filing of a substituted base, within the time allowed, is all that is required to protect the applicant's rights under his original application, and that should the applicant fail to file such substituted base in due time, the case would be closed, and the land open to settlement by the first qualified applicant.

Comp. Ex. 28, pp. 62-63.

In the case of Wilson F. Pleas, decided October 18, 1906, it appeared that Pleas applied, as assignee, to enter under section 2306, Revised Statutes. A junior application was made by the Aztec Land & Cattle company under act of June 4, 1897. Upon examination of the additional homestead right offered by Pleas the General Land Office required certain evidence to be furnished. Pleas appealed to the Secretary of the Interior, then withdrew his appeal, and offered a selection under Act of June 4, 1897.

It was held:

"In the decision appealed from it was held that by failing to substitute a valid soldier's right of additional entry in place of the alleged right derived from Boster, Pleas lost all rights acquired under his original application. This view is in harmony with the unreported departmental decision of October 11, 1904, in the case of John C. Ferguson.

"In the case before us, when the offered base proved invalid and no like valid base was supplied, the said com-

pany's lieu selection right attached and became superior to Pleas' right under the lieu selection which he subsequently offered as a substitute, not being entitled to consideration as a substitute, and adverse rights having intervened, his said lieu selection was properly rejected."

38 L. D., 226, p. 227.

It will be observed that this decision awarding the land to the junior applicant is not based upon the proposition that Pleas had not the right to substitute a valid additional right, but that he did not apply to substitute *in kind*, and that his application to select under act of June 4, 1897, not being in aid of his original application was subordinate to the application to select previously made by the Aztec Land & Cattle company. This ruling is in accord with the instructions of February 8, 1905 (Comp. Exhibit 28, p. 72), where it is held (p. 74) "there is no decision or ruling known to this office by which any rights obtained under original applications can be maintained by the substitution of any other than scrip of the same character as that upon which the original application is based."

As late as June 16, 1910, the Secretary of the Interior held in the case of a junior application that it, "as matter of administration could not be, and was not, allowed because of the pending application of Smith, which had not at that time received consideration * * upon its merits," and that

While the land department was not bound to allow the proffered substitution, it undoubtedly had, and still has, the right to do so, and there would seem to be no good or sufficient reason why this should not be done.

Emerson D. Smith, assignee, v. Robert L. Whitehead, unreported. Copy of the entire decision is herewith submitted as an appendix.

This decision was vacated and set aside on authority of the decision of the Circuit Court of Appeals in the present case.

Further evidence of the practice of the Land Department, in the matter of substitutions, and its construction of the decisions in the White and Ferguson cases, is furnished by the decision of the Commissioner of the Land Office, rendered July 10, 1905, in the case of Maginnis, assignee of Davis. He said, referring to the application for time within which to substitute, and to an objection thereto, by counsel for the Northern Pacific Ry. Co., claiming an intervening right,

> "In the case of Robeson T. White, 30 L. D. 61, it is held in effect that an applicant under Sec. 2306, R. S., after due notice that a soldier's additional homestead right, upon which his application is based, is for any reason illegal or invalid, may substitute another soldier's additional homestead right as a basis for his original application without waiving any rights acquired by virtue of such original application.
>
> In accordance with the case of Robeson T. White, supra, and the case of John C. Ferguson (Secretary's decision of Oct. 14, 1904—unreported), the application of Maginnis serves to protect his rights as against other applicants until such time as the case is closed upon the records of this office, and the tender of the selection of the Northern Pacific Ry. Co., for said tract can confer no right upon the company as against this applicant, but serves to protect it against others."

Comp. Ex. No. 23, pp. 53-54.

In reversing this decision the Secretary called attention to the fact that from the time the Maginnis application was suspended in April 7, 1904, he took no action in the matter, either by applying for a hearing with a view to establishing the validity of said right within the time allowed him therefor, or by the substitution of another right, until May 10, 1905, more than a year after such suspension. He then said:

"The original application by Maginnis failed. While it was pending it barred the allowance of another claim

for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but when the first application failed, the selection took precedence over a second application by Maginnis after such selection."

Comp. Ex. 24, pp. 55-56.

This case is to be distinguished from the present one by the fact that Robinson applied for leave to substitute, within the time within which he could appeal from the decision of the local officers, and it is a fair conclusion from the statement that had Maginnis taken like timely action, instead of sleeping on his rights, the decision would have allowed the substitution. But if it be different, and this decision is construed to hold that an intervening application becomes effective upon the failure of the additional homestead right tendered with the prior application, it marked a change in the rule, regulation, practice and decisions which had preceded it, and should not have controlled the action of the Department in respect of rights which had their inception prior thereto.

In his decision on petition for re-review in the Maginnis case, rendered Sept. 7, 1906, the Secretary cites the Ferguson decision as authority for the rule that an application to enter land under Sec. 2306 stands or falls by the character of the additional right tendered with it. He said:

> "This ruling was long prior to the proffer of the indemnity selection by the railway company and the substituted application by Maginnis. It clearly outlines the rule of administration in the disposition of soldiers' additional homestead applications and all subsequent applications prior to the allowance of the additional. In the absence of an intervening application there can be no question but that the substitution of another application might be allowed at any time but it cannot be assumed that with the presentation of a soldiers' additional application there is carried a right, in the event the application fails, to substitute another. The substituted application is in

reality a new application and no rights are gained thereunder because of any prior application."

Comp. Ex. 26, pp. 58-59-60.

The action in the Robinson case was founded upon the foregoing decision.

Comp. Ex. 18, p. 46.

Comp. Ex. 19, pp. 48-49.

Comp. Ex. 21, pp. 50-51.

It is confidently submitted that until the decision in the Maginnis case there was no intimation in any of the instructions, regulations or decisions that a substitution was in effect a new application for the land desired, but that on the contrary it was a proceeding in strict analogy to and harmony with the practice authorized in such cases as the Secretary referred to in the Robeson T. White case. The term "substitution" cannot possibly be construed to mean a new and separate application taking effect when tendered, since to substitute means to replace one thing by another, and the citations we have made show conclusively that the Land Department until the decision in the Maginnis case, used the term in that sense alone.

It is advanced in opposition to appellants' contention that the facts of the White case did not involve the question of substitution. To this a very lucid answer is made by Judge Sanborn in his dissenting opinion, and for ourselves we are unable to see or appreciate the distinction made in the majority opinion of the court that one having a preference right of entry under the act of May 14, 1880, is in any better position than any other applicant for public land. Any application for land open to disposal involves a preference over subsequent applications, and the only essential difference in cases arising under that act is that there is a practical reservation of the land for the period of thirty days in the interest of the successful contestant. To preserve his rights, it is just as necessary that he should within that period show himself qualified to make the entry, as it would be for any other applicant.

McGee et al v. Ortley et al, 14 L. D. 323; Wyatt v. Wells, 25 L. D. 311. If he applies under Sec. 2306 as the assignee of a soldier's additional right, his application either must be held to be susceptible of perfection by substitution, should the tendered soldier's right be found to be invalid, in accordance with the ruling in the White case, or else it must be held to fail absolutely as ruled in the Maginnis case.

However, it is unnecessary for us to discuss this point farther. The fact is, as has already been shown, that the Land Department, following the White decision, did authorise substitutions, and that the practice prevailed until the decision in the Maginnis case.

Regarding the Ferguson case it is not mentioned in any of the decisions as establishing the rule that an application to enter under Sec. 2306, R. S., cannot be perfected by substitution, until the decision of Sept. 7, 1906, upon petition for re-review in the Maginnis case. Prior to that time the Department construed it as going no further than to permit junior applications to go upon record subject to final determination of the rights of the first applicant, including the right of substitution.

Instructions of February 8, 1905. Comp. Ex. 28, p. 62.

Decision of General Land Office July 19, 1905. Comp. Ex. 28, p. 53.

As stated by Judge Sanborn, page 94:

"The decisions and declarations which have now been recited constitute all the evidence that was produced in this case upon the issue of the prevailing rule and practice on October 4, 1905, when Robinson filed his substituted additional and secured his right to this land." He continued:

"They seem to me to demonstrate the fact that the rule and practice that an original application might be supported by a substituted additional homestead right and that such an application so supported gave to the applicant a preference right to enter the land over a junior applicant who presented his appli

cution before the substitution had been declared and followed in every case and instruction in which the question had arisen for more than five years prior to October 4, 1905, and there had been no decision, declaration, instruction or suggestion to the contrary."

III.

The opinion of the Court of Appeals cites the act of March 3, 1893, c. 208, 27 Stat. 593 (U. S. Comp. St. 1901, p. 1416), and holds that under this statute the Department has no power to make a rule which would cut off the right of an adverse claimant. This act was followed by that of Aug. 18, 1894, (28 Stats. 397) and was construed by the Department as intended to afford larger relief than that of March 3, 1893.

John M. Rankin, 21 L. D., 404.

Robords v. Lakey et al, 24 L. D. 291, pp. 294-5.

These acts arose from the practice that prevailed from 1877 to 1883, requiring that proofs of claimed additional homestead rights should be first presented to the Commissioner of the General Land Office, when if found satisfactory they would be returned to the party with a certificate recognizing his right to make entry. Such rights are known and designated as "certified rights." During this period also, and prior to the decision of this court in the case of Webster v. Luther (supra) the additional homestead right was held to be personal and not subject to assignment.

Paulson v. Owens, 15 L. D. 114.

Instructions February 12, 1883. 1 L. D. 654.

Nevertheless they had been commercially bought and sold in good faith, in reliance upon the certificate as evidence of the right itself and of the legal power of the holder to sell the same.

"In some cases it has been found that certificates were erroneously issued; that at the time of

the issuance thereof the soldier was not entitled to enter additional land as set forth therein. In such cases the soldier * * may have entered land and disposed of his right thereto to innocent purchasers, relying on the certificates of rights issued by this office; in other cases certificates of right had been secured through the presentation of spurious and fraudulent papers, and these have passed into the hands of innocent purchasers. The provisions of the act of March 3, 1893, seem to fully cover these classes of cases, and afford relief to purchasers thereof such as they are equitably entitled to."

Report of Commissioner of the General Land Office to Senate Committee on Public Lands, quoted in case of John M. Rankin, 24 L. D. 404, p. 406.

It thus appears that the act of March 3, 1893, enlarged by the act of August 18, 1894, was for the purpose of confirming entries in the hands of innocent purchasers, where such entries were invalid either because the additional right itself was fraudulent, or when, under the then rulings of the Department, the entry was invalid because of a sale of the right.

As has been shown the application to enter land with one of these certified rights, if the land were open to disposal, became an entry and segregation. If for any reason the application when tendered, was suspended or rejected, its subsequent allowance would depend upon the final decision as to the status of the land at that time, and should it be found that when the additional homestead application was tendered there was no prior claim, and the land itself was open to entry, it is evident that there could be no subsequent "adverse claim" sufficient to except such entry or application to enter from the provisions of the act of March 3, 1893.

Further, in many cases, such entries had been canceled for one of the invalidities specified, and subsequent to such cancellation the land entered had been settled upon or applied for by some other person. From this situa-

tion it is clear that the "adverse claims" referred to in the confirmatory act must have been either

a. Claims which had their inception prior to entry or application to enter.

b. Claims which had their inception after the final rejection of the application or cancellation of the entry.

A confirmatory act of congress is the equivalent of a new grant; and the act of March 3, 1893, would have operated as such to the extinguishment of inchoate rights had they not been specifically preserved. An instance of adverse claim asserted by settlement subsequent to the entry upon land embraced in an alleged void additional entry, is found in the case of Oliver v. Thomas et al. 5. L. D. 289.

In another case "the many entries, relinquishments, contests, protests and appeals" were stated to serve more to mystify than to enlighten. Among the entries allowed were certain additional homesteads. It was decided that a prior application of one Mrs. Stanton should have been allowed by relation, after denial of a claimed preference right by another. The secretary then said:

> "This cut off all subsequent claims, including the soldier's additional entries * * * presented March 8, 1890, by C. W. Riner, as attorney-in-fact for Young, Brown and Mayer. It is clear that had these soldiers gone in person to the land office and had been allowed to make these entries in their own proper persons, it could not have served to defeat the prior rights of Mrs. Stanton, based upon a departmental decision of her right of entry. It follows, therefore, that the recent act of congress approved August 18, 1894, which only purported to validate soldier's additional homestead certificates, in the hands of bona fide purchasers for value, cannot be invoked to defeat rights which accrued prior to its passage."
>
> Stanton et al. v. Constantine, 19 L. D. 160, p. 163.

In another case reinstatement of a canceled additional entry and confirmation under act of August 18, 1894,

was denied for the reason that prior to said act a contestant's preference right of entry had intervened. The secretary said:

> "The intent of the act of August 14, 1894, was to afford relief to those who had violated the law; but surely it did not contemplate the spoliation of one whose only offense was that he had spent his time and money in reliance upon the good faith of the government."

Mee v. Hughart et al. 20 L. D. 2, p. 3.

In the case of Raymond et al. v. Redifer's Heirs, et al it was held that a transient occupancy of land as a mining camp, where no steps were taken to assert a legal right did not bar confirmation of an additional entry under the act of 1894. The question decided was whether the land was properly subject to homestead entry at the date said entry was made.

21 L. D. 228.

We submit that the proposition that a claim asserted to land entered or applied for, which had its inception during the time that the entry was intact, or the application to enter was still pending, cannot be held to be an adverse claim within the meaning of the confirmatory acts of March 3, 1893, and August 18, 1894, from which it follows that those acts have no bearing upon or application to the question presented in this case.

The court of appeals also calls attention to the fact that the circular of February 18, 1890, makes no reference to the right of substitution, but the reason it gives for that omission is not the right one. At that date, and until the assignability of additional rights was affirmed by this court in 1896, substitution was not possible. The additional right was considered by the Department to be personal. The applicant was the soldier, or alleged soldier, himself. If his claim was not valid, he could not perfect his application by offering the right of another. Moreover, he could scarcely be said to be entitled to any consideration since his application must have been

founded upon affidavits made by him and known to be false. But that circular did protect all rights until final rejection of the application, and it served also to protect the rights of applicants to enter with assigned claims, and with more reason, if possible, because such applicants were depending upon the asserted rights of others as to which they had no means of ascertaining the falsity. If the additional homestead right was to be made available to the soldier by its sale, and to the applicant by its use, he must have of necessity purchased the assignment thereof, in reliance upon the proofs accompanying it. The Department afforded no protection by prior ascertainment of the validity of the additional homestead right, and the least it could do was to protect the right to the land applied for, as was done by the decision in the White case, and subsequent practice thereunder.

It cannot be denied that the Secretary of the Interior had the power to prescribe the rules and regulations under which the provisions of the additional homestead law should be cried into effect, and that he exercised that power from time to time, in prescribing how the right should be used, and in modifying and amending such first instructions as experience seemed to require. He first authorized the entry to be allowed, and the land consequently segregated in much the same manner as original homesteads, upon application and affidavits of qualification. It was then provided that the right to an additional entry should first be determined by the Land Department, and certified, after which upon application entry was allowed. This method having also proved unsatisfactory, practically the original method was in 1885, restored. In 1890, the procedure was again amended to that under which the application of appellant was made, providing that certificates of entry should not be issued until the right should have been examined and found valid by the General Land Office. Surely, if, and it is not denied, the Secretary had power to authorise a segregation of the land by entry as under the first regulations

adopted, he had power also to provide for a segregation of the land by the regulation of 1890, until he should have finally disposed of the rights of the applicant. At least so far as the rights of the applicants as against third parties were concerned. And when the decision in the case of Webster v. Luther introduced a new element into the law, he must have had power to meet the changed condition by suitable regulations which would recognize the fact that the applicant to enter, in most cases, was applying in right of another with whose qualifications he could not be acquainted except by means of such affidavits as were offered.

The authority of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, to enforce and carry into execution by appropriate regulations every portion of the Revised Statutes relating to the public lands, is conferred by Sections 441, 453 and 2478.

The mode in which the supervision of the public lands shall be exercised in the absence of statutory directions may be prescribed by such rules and regulations as the Secretary may adopt.

The general words of these sections are not supposed to particularize every minute duty devolving upon him. There must be some latitude for construction. In the language of Knight v. Land Association, 142 U. S. 161, pp. 178-181:

> "It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the land department, matters not foreseen, equities not anticipated and which are therefore not provided for by express statute, may sometimes arise, and therefore, that the Secretary of the Interior is given that superintending and supervising power, which will enable him, in the face of these unexpected contingencies, to do justice."

Williams v. U. S. 138 U. S. 514, p. 524;
See also Cuba v. U. S., 152 U. S. 211, p. 221.
Cosmos Co. v. Gray Eagle Co. 190 U. S. 301.
Roughton v. Knight, 219 U. S. 537.

In the light of the history of the additional homestead law, and its administration, are not the claims of applicants as assignees of its beneficiaries "matters not foreseen" and do they not present "equities not anticipated"?

Neither the regulation of 1890, or the practice of substitution authorized by the White decision is opposed by any statute of the United States, but both are consistent with the fair and proper administration of section 2306 of the Rev. Stats. They were intended to, and did protect the rights of the first applicant for land subject to disposal, without injury to the United States, or to any citizen. While extending such protection, they do not authorize or permit the unlawful disposal of the public lands, for they provide that an additional homestead right surrendered with the application found upon subsequent investigation to be invalid, shall be replaced by a valid one, as for many years previously had been the rule with respect to military bounty land warrants and other scrip. They do not invade the rights or equities of a junior applicant, who may seek to acquire the land because he does so with notice that the land department holds it to be segregated by the prior application, and that his junior application gives him no right other than to be preferred in the purchase of the land over such applicants as might come after him.

In this particular case the application of the railroad company to select was made with notice that it was subject to the soldiers' additional homestead application of Robinson, and with consequent notice of all the rights that he had under the regulations and decisions of the land department.

The federal courts have been prompt in such cases as this to protect the equities of the prior applicant.

"But whilst * * * no vested right as against the United States is acquired until all the pre-requisites for the acquisition of title have been complied with, parties may, as against each other, acquire a right to be preferred in the purchase or other acqui-

sition of the land when the United States have determined to sell or donate their property. In all such cases the first in time in the commencement of proceedings for the acquisition of the title, when the same are regularly followed up, is deemed to be first in right."

Shepley v. Cowan, et al., 91 U. S. 330, p. 338.
Sturr v. Beck, 133 U. S. 541, citing;
Witherspoon v. Duncan, 4 Wall 210, p. 218;
Chotard v. Pope, 12 Wheat, 586, 588;
Hastings & Dakota R. R. Co. v. Whitney, 132 U. S., 357, p. 366.

In the case of U. S. v. Detroit Timber Co., this court said:

"But while until the issue of the patent the land is under the control of the Land Department, which, upon proper investigation and for sufficient reasons, may set aside the certificate of entry, yet this power of the Land Department cannot arbitrarily be exercised, without notice to the entryman, and if improperly exercised the rights of the entryman may be enforced in the courts after the patent has issued to other parties."

200 U. S. 321, pp. 337-338.

And that: "In passing upon transactions between the government and its vendeers we must bear in mind the general principles of equity and determine rights upon those principles except as they are limited by special statutory provisions."

Ib. p. 339.

In every material respect the case of Robinson is worthy of and entitled to the application of the principles enumerated in this case and the other cited cases.

It is not necessary, for the purpose of this case, to dispute the power of the Secretary to adopt the rule announced in March, 1906, in the Maginnis case. All that we are concerned with here is the retroactive application of that rule to rights that had vested prior to its adoption under the operation of a different rule.

Even the Land Department, if we except the Maginnis case, has consistently recognized and applied the principle that rights acquired in conformity with rules and regulations in force at the time are protected from the effects of any subsequent change of rule. Upon this point we cite:

Oliver vs. Thomas, 5 L. D. 289;

Sandy D. Bullock, 37 L. D. 23;

J. B. Weaver, 35 L. D. 553;

Oliver vs. Bates, 36 L. D. 423, p. 427.

In the case of Oliver v. Thomas, Mr. Justice Lamar, then Secretary of the Interior, said:

> "The Thomas entry, therefore, having been made and allowed under the rulings then in force, and not being in conflict with the law as then interpreted, should be allowed to stand. The entryman complied with all the regulations of the Department in the matter of his entry and he should not be prejudiced now, because those regulations have been changed. 1 Kent's Com., 476; Brown v. United States, (113 U. S. 568) and cited cases." 5. L. D. 289, p. 292.

In the case of Germania Iron Co. v. James, 89 Fed. 811, the question was whether a rule of the land department, that after cancelation of an illegal entry of public land, such land should not be open to disposal to others until notice of cancelation was received at the proper land office, could be modified and changed by the Secretary of the Interior, to the detriment of applicants who made their applications in conformity with that rule, and prior to such modification or change. The court, among other things, said:

> The rule and practice here under consideration stands upon higher ground than the ordinary rules for the mere conduct of proceedings in courts. They condition the inception, the foundation, the very existence of all rights and titles to this land. Rights initiated in accordance with them become vested interests in property, and attempts to establish rights

in violation of them were as though they had not been. They had become an established rule of property upon which men relied and had the right to rely. The maxim *stare decisus, et non quieto movere*, applies nowhere more universally or with more salutary effect than to those rules and that practice under which property is acquired and secured. It is often far more important that these should be certain and changeless, than that they should be right. * * *

Nor was it within the supervisory power of the Secretary or of the Commissioner to set aside or annul rights acquired under this rule and practice * * * by a retroactive decision * * * to the effect that the established rule or practice when he made his entry was either inconvenient or erroneous. They might undoubtedly have made and promulgated a new rule which would govern cases arising after a new rule of practice had been made and had become known. (P. 817).

To the same effect is cited Howe v. Parker, 190 Fed. 738, p. 757.

If, as we contend, it has been shown that the issuance of the final certificate of entry to Robinson, in accordance with the directions of the commissioner's letter of August 29, 1905, was authorized by the established rule and practice of the land department, then this case is governed by the principle of *stace decisus* as announced in the Germanian Iron company case, and in the decisions of the Land Department, and cases therein cited.

We, therefore, submit that the cancelation of Robinson's entry, and the issuance of the patent of the United States for the same land to another, was erroneous, and exceeded the power of the Commissioner of the General Land Office and the Secretary of the Interior; that the equitable title of Robinson and his grantees was not divested by that action, and that appellants should be granted the relief prayed for in their bill of complaint.

Very respectfully,

C. D. O'BRIEN and
P. H. SEYMOUR,
Solicitors for and of Counsel with Appellant.

245058
B
S. E. H.

DEPARTMENT OF THE INTERIOR,
General Land Office,
Washington, D. C.

January 13, 1911.

I hereby certify that the annexed copy of Departmental Decision of June 16, 1910, is a true and literal exemplification from the original on file in this office with Roswell Serial No. 012085.

IN TESTIMONY WHEREOF I have hereunto subscribed my name and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

N. A. FENGARD,
Recorder of the General Land Office.

M. L. 245038—1

K. M. T. G. B. G.
G. B. E.

DEPARTMENT OF THE INTERIOR
Washington

Jun 16 1910

Address only
The Secretary of the Interior

E-1794.
1795.

Emerson D. Smith, assignee of heirs of Jesse Shewmake and heirs of James Shaffer v. Robert L. Whitehead.	Review—Department decision recalled and vacated—Reversed—Roswell, New Mexico 03220.

Revived Jun 13 1910 G. L. O.

The Commissioner of the
General Land Office.

Sir:

This is a duly entertained motion on behalf of Emerson D. Smith for review of departmental decision of November 30, 1909, not reported, which affirmed without discussion your office decision of August 4, 1909, denying his application to enter under section 2306 of the Revised Statutes the N.½ of the NW.¼, Sec. 13, T. 2 N., R. 35 E., Roswell land district, New Mexico.

The pertinent facts are as follows:

August 5, 1905, one James Ticer made homestead entry of this and other land, and about September 11, 1908, the said Emerson D. Smith purchased for a cash consideration of $2500 Ticer's relinquishment of the eighty acres above described, and on that day filed such relinquishment in the local land office, together with his application under section 2306 of the Revised Statutes to enter the

land, based on original homestead entry of one James Shewmake at Little Rock, Arkansas. This additional right under the rule governing procedure in such cases was forwarded by the local officers to your office, where, upon examination, it was found to be invalid for reasons stated in your office decision of April 28, 1909.

It did not appear, was not, and is not claimed that Smith had any knowledge, information, or belief that the additional right so proffered by him was defective for any cause. He did not appeal from your said office decision, but on June 2, 1909, within the time allowed him for such appeal, he filed in your office his application to substitute for the right so adjudged to be invalid, the soldiers' additional right of one James Shaffer, supported by due proof of the ownership of such right.

In the meantime, however, on February 6, 1909, your office had inadvertently and erroneously held Smith's application for rejection because the land applied for appeared to be subject to the Ticer entry, his relinquishment not being noted, and on February 16, 1909, four days after such inadvertent and erroneous decision, Robert L. Whitehead filed his homestead application for said land in the local land office. Your said office decision of August 4, 1909, and said departmental decision or November 30, 1909, now under review, sustain the claim of Whitehead and deny Smith's proffer of substitution.

Upon a more careful consideration of this case it is now thought that these decisions work injustice clearly within the power of the Secretary of the Interior to correct.

It is said that this land has a value, apart from its use as a homestead, for townsite purposes, and it is frankly admited on behalf of Smith that he is attempting to secure title to the same for such purposes, it being urged as the basis of his claim, the equitable consideration that he and another, to whom he is under contractual obligations with reference to the land, have spent in attempting to acquire title thereto for townsite exploitation, more than $3000.

Whitehead alleged no settlement right or claim or other equity which entitles him to special consideration, and under the orderly procedure of the land department his application as matter of administration could not be, and was not, allowed because of the pending application of Smith, which had not at that time received consideration by your office upon its merits.

While the land department was not bound to allow the proffered substitution, it undoubtedly had, and still has, the right to do so, and there would seem to be no good or sufficient reason why this should not be done. The large amount of money which Smith expended, his good faith in a legitimate undertaking, his prompt offer of valid consideration to the government, and the utter absence of counter equitable considerations, strongly appeal for the relief which the land department indisputably has the right to extend.

Departmental decision of November 30, 1909, is hereby recalled and vacated, and your office decision of August 4, 1909, is reversed, and the case remanded for proceedings not inconsistent with this decision.

Very respectfully,

FRANK PIERCE,
First Assistant Secretary.

INDEX

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM 1912

NO. 108

JOHN E. C. ROBINSON, Et Al,

Appellants,

vs.

JOHN R. LUNDRIGAN,

Appellee.

BRIEF FOR APPELLEE

ARGUMENT

Statement of Appellee's Position.

A patent for the land involved in this action was issued to the Santa Fe Pacific Railroad Company on the 20th day of July, 1908. (Record, p. 22).

On the 18th day of November, 1908, the said company conveyed the said premises to the appellee, John E. Lundrigan. (Record, p. 23).

The complainants commenced this action against the said railroad company and the appellee, herein, to have it declared that the title was held in trust, and inured to the benefit of the appellants.

The said railroad company appeared and filed a disclaimer, alleging that it had conveyed all its right, title and interest in and to said premises to the appellee, J. E. Lundrigan, and the action has been continued against him alone.

The appellants contend that the patent should have been issued to J. E. Robinson, one of the appellants, by virtue of a soldier's additional homestead application, and that the Land Department erred in rejecting said application and in allowing the entry of said railroad company, under the provisions of the Act of June 4, 1897.

Robinson, as assignee of James Carroll, applied to enter said land, under Section 2306, R. S., in 1901.

In 1904, Robinson was ruled to show cause why his application should not be rejected because of the invalidity of the soldier's additional right which he had tendered, and a hearing on said order to show cause was ordered to be held in June, 1905. Robinson made no appearance at the hearing and, on July 15, 1905, the local officers recommended that the application be rejected on the ground that it appeared from the evidence taken at the hearing that the James Carroll, who had assigned to Robinson, was not the James Carroll who had made the original homestead entry on which the additional right was based. (See Bill of Complaint, fol. 2 and also fol. 18).

On July 25, 1905, Robinson made an application to the Commissioner of the General Land Office, which he labels an appeal, but in which he says:

"Appellant is deeply sensible and appreciates the seriousness of defaulting at said hearing, *and does not ask that the case be reopened.* This appeal is not taken for the purpose of hindering or delaying the adjustment of long drawn out matters, but with the hope and urgent request, that under the circumstances, appellant be given thirty days within which to *rescrip* said above mentioned tract." (Record, p. 14).

On August 29, 1905, the Commissioner, in response to Robinson's application to rescrip, advised the local officers, in reference to their recommendation for the rejection of Robinson's application, as follows:

"Your said decision is accordingly affirmed and the said application is rejected *and the case closed.* You will so note on your records. You will also notify the applicant that he will be allowed 30 days from notice hereof in which to file a proper substitute for the right hereby rejected." (Record, p 16).

On October 4th, 1905, Robinson filed the additional homestead right of Justus F. Heath, which upon examination was found to be a valid right, and in March, 1906, a final receipt was issued to him.

On July 11, 1905, more than six weeks prior to the time when Robinson made his application to be allowed the privilege of rescriping the land, the Santa Fe Railroad Company applied to enter said land, under the provisions of the Act of June 4, 1897, and the said application was allowed, and noted on the records, subject to the final disposi-

tion of the soldier's additional application of Robinson, as assignee of James Carroll. (Complainants' Ex. No. 1, p. 30).

At the time the final receipt was issued to Robinson, as assignee of the Justus F. Heath right, the application of the railroad company was rejected as being in conflict therewith, with the right to appeal from said decision.

The railroad company had not been a party to any of the proceedings in the Department, regarding the investigation of the validity of the James Carroll right, or the subsequent location and allowance of the Justus F. Heath right, so far as appears from the record, and the first notice the company had of the proceedings was at the time when it was notified of its right to appeal from the decision of the department allowing the entry under the Heath application, and rejecting the application of the railroad company, as being in conflict therewith.

The railroad company promptly appealed and, on June 14, 1906, the Commissioner of the General Land Office rendered his decision cancelling the entry, under the Heath application, and allowing the application of the railroad company. (Record, p. 17).

The grounds upon which the Commissioner based his decision were, that, at the time Robinson applied to file the substituted right, the application of the railroad company had already been offered, received and was held subject to the final disposition of Robinson's application under the James Carroll right; and that when that right failed and was rejected the railroad company's

application took precedence over the second application of Robinson, which was made subsequent to the railroad company's application. (Record, p. 17).

On February 25, 1907, Secretary Hitchcock affirmed this decision of the Commissioner. (Record, p. 18).

On a motion for review, Secretary Garfield affirmed the former decisions. (Record, p. 20).

On a motion for re-review, Acting Secretary Woodruff reaffirmed the former holdings. (Record, p. 21).

Thus it will be seen that the Commissioner of the General Land Office, and three different secretaries have, after elaborate and exhaustive arguments, and after mature deliberation and consideration, rejected the contentions made by the appellants in this action. And it is further to be observed that the Land Department has been upheld by the Circuit Court and the Circuit Court of Appeals.

The sole and only question involved in this case is this: Is a person who applies to enter public land, with an invalid soldier's additional right, entitled, after his invalid application has been rejected, to a grant of additional time to obtain valid scrip with which to enter said land, where a valid application for said land has been allowed and is pending at the time the holder of the invalid right applies for such additional time?

The appellants contend that an applicant, under an absolutely void soldier's additional right, is entitled to an additional grant of time within which to obtain a valid right, notwithstanding the

fact that, at the time the original applicant's right was rejected as invalid, another valid application for the land is pending.

The appellants base their contention, solely, upon the ground, that the right to additional time, under such circumstances, had been established by the custom and practice of the Department.

The appellee, on the other hand, contends:

First, that no such custom or practice was in force.

Second, that even if such a custom and practice was in force, and had been adopted and recognized by the Department, that it was contrary to law, and no legal rights could be obtained under such custom and practice.

We contend that, even if it be conceded that there was an established custom, in the Department, granting additional time to an applicant for public land to substitute valid for invalid scrip, that the granting of such right, *where it conflicted with the adverse rights of other qualified applicants,* would be an enlargement of, and an addition to, the terms of the statute, by the Department, and that such a practice would be beyond the powers of the Department.

PART I.

NO SUCH CUSTOM WAS IN FORCE.

It will be noticed that the appellants, nowhere in their brief, maintain that the right to a grant of additional time to obtain valid soldier's additional scrip to substitute for invalid scrip, where a valid adverse application is pending, is confered by the statute itself, but they rest their contention entirely upon the custom and practice alleged to have been in force in the Department.

It is incumbent upon the appellants, therefore, to clearly show that such a custom prevailed.

The only proof upon which the appellants rely to establish the custom of the right to substitute a valid soldier's additional right for an invalid one is the case of Robeson T. White, 30 L. D., 61, and the Land Office Circular of February 18, 1890.

Neither the circular nor the case cited bear out appellant's contention.

In the White case the applicant applied to enter certain land with a soldier's additional certificate. Afterwards, believing that there were certain defects in the first piece of scrip offered, he tendered another soldier's additional certificate, but did not abandon or withdraw the filing of the first piece of scrip.

Prior to White's second application, another party applied for the land, and a contest arose between the two applicants, the second applicant contending that the offer of the second piece of scrip by White was an abandonment of the application made under the first piece and that his rights attached prior to the time the second piece was offered.

But the Department held that White had never abandoned his first application, and as it turned out that the first piece of scrip was *not* defective White was allowed to take the land.

On page 63, the Secretary says: "It does not appear that White at any time withdrew, abandoned, or receded from his original application to enter."

Again, on the same page he says: "But the facts tend to show that the first right offered to be located was perfectly valid."

Again, on page 64, he says: "There is nothing in the record to show that he has waived any right he acquired by his first application under the Carver right."

The distinction between the White case and the case at bar is perfectly manifest.

In the case at bar, Robinson's first application, after a formal hearing in the Department for the very purpose of determining the validity of the Carroll scrip, was rejected and the Commissioner directed the local officers to so "note it upon the records."

In the White case, no hearing was ever had as to the validity of his first application and the

application was never rejected by the Department.

White simply became fearful that there was some defect in the first application, and without any hearing, and without withdrawing or abandoning his first application, and, as a matter of precaution, he tendered a second application.

But the Department held that his mistake as to the validity of the first application could not affect his legal rights under it, so long as there was no formal withdrawal of it, and so long as it still stood as an application upon the records.

Furthermore, the decision in the White case did not turn upon the question of the right to substitute a valid for an invalid right.

White had instituted a contest against a prior entry and had been successful. Under the laws of the United States, a successful contestant is given a preferred right of entry over other applicants.

White's right to the land, therefore, was by virtue of his successful contest. The soldier's additional right which he tendered was merely in aid of his right as a successful contestant. In other words, he had a right to the land *independent* of the application under the soldier's additional right, and if that failed he had the right to take it in any other lawful way.

But, in the case of Robinson, his right depended solely and alone upon the soldier's additional right of James Carroll, and as this right was invalid, Robinson's application was invalid.

On page 64. in the White case, the Secretary says:

"The intention to claim benefit of and attempt to exercise his preference right, earned by his successful contest of McCrimmon's entry, was the essential part of the transaction. In what manner or by what consideration the government should be satisfied for the land was only matter of incident to the essential and principal thing—*the exercise of his preference right of entry.*"

We contend, therefore, that the White case does not support the appellants in their contention that a custom was in force in the Department which permitted the substitution of a valid soldier's additional right for an invalid one.

The only other piece of evidence which the appellants offer that a custom prevailed in the Department permitting an applicant to substitute a valid soldier's additional right for an invalid one, where it conflicted with an adverse application is the Land Office Circular of February 18, 1890.

This circular will be found on page 67 of the record.

This circular simply directed the local land officers that where parties apply to make entries with *uncertified* soldier's additional scrip, "that before taking final action on the claim you forward the papers to this office for examination in connection with the official records, after making the notations on your records necessary to show the pendency of the application, and the consequent segregation of the land, so as to prevent any adverse appropriation before the application is finally acted upon, and await further instructions before taking any further action in the case."

What is there in this circular to warrant the assumption that a party who had applied for public land, with an invalid soldier's additional right, would be given the right to substitute valid scrip, where it conflicted with an adverse application?

The question of the right to locate a second piece of scrip, where the first location is found to be invalid, is not mentioned, or even remotely suggested.

The circular simply directs that, where an application for land is made with uncertified soldier's additional scrip, the application should be noted on the records so as "to show the pendency of the application," and that the scrip be forwarded to the General Land Office for examination, and that the local officers should await instructions "before taking any further action in the case."

Nothing is said as to what the status of the applicant will be in case it is found that his application must be rejected by reason of the fact that his scrip is invalid.

As we have said before, the appellants do not rely upon the statute for the right to substitute valid for invalid scrip.

They have not cited, and cannot cite, a single provision of the statute which gives such right, either expressly, or impliedly.

They rest their contention to this right of substitution, solely and exclusively, upon a custom and practice in force in the Department.

Now the question as to whether or not a certain custom and practice was in force in the Department is a pure question of *fact*.

Where a party relies upon an asserted custom or practice, for the exercise of a right, he must show clearly, positively and affirmatively that such a custom or practice exists *in fact*.

In such cases, it is not sufficient merely to show that such custom *would* be a reasonable one, or that it *would* not be in violation of law, if adopted, but it must be shown, affirmatively, that such a custom and practice has prevailed.

The right, in such cases, does not inhere in the law, but rests upon the fact that a definite course of procedure has been adopted, recognized and maintained, that the party asserting the right has relied, and had a right to rely, upon the custom, and that it would be inequitable to deprive him of the benefit of such custom, after he had relied and acted upon it.

It follows from this that, unless the party asserting the right clearly shows that such a custom has prevailed, there is no foundation for the assertion of the right at all.

There are only two things upon which appellants rely to establish the so-called custom of permitting valid soldier's additional scrip to be substituted for invalid scrip, where the substitution would conflict with an adverse application, and these are the Land Office Circular of February 18, 1890, and the case of Robeson T. White, *supra*.

But, as we have shown, the circular does not consider, or even refer to, the question of the right of substitution, and, consequently, could not be relied upon as affirmative proof of this alleged custom, and, in the case of White, the Department held that the *first* application was a valid one, that

it never had been abandoned, or withdrawn, and further held, and *decided* the case upon the point, that White's status before the Department, and his right to the land, was to be determined, not by the question as to whether or not he had the right to substitute valid for invalid scrip, but by the fact that he was *the successful contestant of a former entry.*

The appellants, therefore, are left without any proof that such a custom was in force, and as they rely, solely, upon the existence of such a custom there is no basis for the assertion of the right for which they contend.

As further evidence of the fact that such a custom and practice was not in force, we cite the following decisions rendered by the Department itself.

Case of Charles P. Maginnis, Commissioner's decision. (Record, p. 53).

Case of Charles P. Maginnis, Secretary's decision overruling the Commissioner. (Record, p. 55).

Case of Charles P. Maginnis, Secretary's decision on motion for review. (Record, p. 57).

Case of Charles P. Maginnis, Secretary's decision on motion for rereview. (Record, p. 58).

Case of John C. Ferguson, Secretary's decision. (Record, p. 60).

Case of J. E. C. Robinson, Commissioner's decision. (Record, p. 44).

Case of J. E. C. Robinson, Secretary's decision. (Record, p. 46).

Case of J. E. C. Robinson, Secretary's decision for review. (Record, p. 48).

Case of J. E. C. Robinson, Secretary's decision on motion for rereview. (Record, p. 50).

In the case of Charles P. Maginnis, *supra,* the Commissioner granted the applicant the right to substitute a valid soldier's additional right for an invalid one, where a valid, adverse application was pending, and he cited the case of Robeson T. White, *supra,* as authority for his action.

But his action was reversed by the three, several decisions of the Secretaries noted above, and Maginnis was denied the right of substitution.

Counsel for appellants say that there is a distinction between the Maginnis case and the case at bar, in this, that Maginnis made his application to substitute valid scrip too late.

But the trouble with this attempted distinction is that the Department did not base its decision on the ground that Maginnis was too late in making his application, but upon the ground that the right of substitution could not be allowed when a valid, adverse application was pending, at the time the offer to substitute was made.

In the first decision by the Secretary, in this case, on page 56 of the record, he says: "Such substitution could not be allowed in the face of the intervening adverse right of the railway company. The original application of Maginnis failed. While it was pending it barred the allowance of another claim for the same land, and the proffered selection by the railway company was rightly held to await final action thereon, but, when the *first* application failed, the selection took precedence

over a second application by Maginnis, *filed after such selection.*"

And, in the decision on the motion for rereview, the Secretary on page 60 of the record, says: "An intervening application clearly bars the right of substitution, *and for that reason* the previous decisions of this Department in this case were correct."

We shall not take the time to review all the cases cited above, at length, on the question that the Department itself has held that no such custom was in force, but commend a careful reading of them to the court.

It will be found that they fully meet all of the questions raised in the case at bar, that they considered the Robeson T. White case, *Supra,* so strongly relied upon by the appellants, and emphatically assert that no such custom has ever prevailed in the Department.

We understand, of course, that the decisions rendered, by the Department are not binding upon the courts, upon questions of law, but only upon questions of fact.

Neither would we maintain that the decisions by the Department as to whether a certain custom had prevailed therein would be binding upon the courts, in the same sense, and to the same extent, as a finding by the Department that a homesteader had not complied with the provisions of the law as to settlement and cultivation of his land, but we do contend that the deliberate and reiterated decisions of a half a dozen different Secretaries on the question as to whether a particular custom and practice has been in force in

the Department is entitled to great consideration and should be deemed almost persuasive, especially as it is in regard to matters within their personal knowledge, and concerning which they have better opportunities for being advised than anyone else.

We have cited the above cases for the purpose of showing that the Department itself has held that no such custom has ever prevailed. But, even if we are mistaken as to the legal effect of these decisions, it could not aid the appellants in their contention.

In order for them to prevail in this action, they must *affirmatively* show that such custom was in force, and it certainly cannot be claimed that either the Maginnis case, the Ferguson case, or the White case hold that an applicant for public land, under a soldier's additional right, can substitute a valid piece of scrip for one held to be invalid, where an adverse application for the land is pending, at the time the offer to substitute is made.

In the Court below, counsel for appellants contended that the "*principle*" of substitution has been recognized in the cases of State School Indemnity selections and Military Bounty Land Warrants, and from this they argued that the "principle of substitution" ought to be applied to soldier's additional homestead rights.

The first and best answer to this argument is, that the right to the benefit of a particular custom, or usage, claimed to exist in a particular matter, is never gained on *principle*, or by analogy, by showing that such custom, or usage, obtains,

as to some other matter, or thing, but the right can only be obtained by showing that the custom, or usage, claimed to exist, has been adopted with reference to the *particular* matter, or thing under which the right is asserted.

In other words, the right to the benefit of a particular custom, or usage, cannot be obtained on *principle*, or by analogy, but only on *practice*.

Counsel's argument amounts to this, that because the Department had allowed the right of substitution in the cases of State School Indemnity selection and Military land warrants, that, therefore, one locating soldier's additional scrip would have the right to infer that the same *principle* of substitution would be applied to the latter.

But a particular custom cannot be established on "principle," nor can it be shown to exist by argument, inference, or implication, *but only by a long continued series of definite acts and transactions.*

If the Department were called upon to construe the terms of some statute and held that it applied to state school indemnity selections and military land warrants, then, on *principle*, the same construction would have to be applied to soldier's additional rights, if the latter came within the reason of the rule of construction adopted.

But the right growing out of a statute are *obligatory*, and must be given to all who fall within its terms.

The adoption of a particular custom, or usage, however, is not obligatory, but *voluntary*.

If it is obligatory upon the Department to

grant the right of substitution, because the right is conferred by the statute itself, then the appellants do not need to rely upon the custom, but can fall back upon the law.

If the adoption of the custom by the Department is not obligatory, but voluntary, then it is no proof that the custom has been adopted with reference to soldier's additional rights, because it has been adopted as to state school indemnity selections and military land warrants.

Neither can it be argued that the custom *ought* to be adopted in the one case, because it has been in the other, for the adoption of a particular custom, or usage, as we have seen, is voluntary and not a matter of compulsion, and the whole question is not whether a particular custom *might* have been adopted, or *ought* to have been adopted, but whether it *has* been adopted.

The question might arise as to whether a particular custom was in force among bankers. It would clearly be incompetent and of no avail to show that such a custom was in force among brokers and was applicable to bankers, because on principle and on reason the custom was as adaptable to bankers as to brokers.

It would be a sufficient answer to show that the custom had never been adopted by bankers, and the question as to whether the same *reasons* existed for its adoption by bankers as by brokers could not be taken into consideration in determining the question whether the custom was, as a matter of fact, in force among bankers.

The question as to whether a particular custom is in force is a question of *fact*, and not of *principle*.

We contend, therefore, that the fact that the right of substitution was allowed in the cases of state school indemnity selections and military land warrants, does not have any bearing on the question as to whether such a custom was in force as to soldier's additional rights.

Furthermore, there is a plain distinction between the two classes of cases and there are good and sufficient reasons why the right of substitution should be granted in the one case, and denied in the other.

In the case of state indemnity land selections and military land warrants the applications for land, under the law, amounted to *entries*, and were an absolute *segragation* of the land from the public domain.

It has been uniformly held by the Land Department that no one else can gain any right thereto while an *entry* is in force.

In the case of John C. Ferguson, *supra*, the Secretary says: "The Department has uniformly held that an entry of the public lands segregates them and no other disposition can be made thereof so long as that entry is in existence, and therefore that any application to make entry, pending during the existence of the enry, must be rejected *and no rghts are acquired thereby.*" (Record, p. 61).

But in the case of the location of *uncertified* soldier's additional scrip, the location was merely

an *application*, and not an entry, and such an application did not segregate the land so as to prevent others from making subsequent applications and obtaining rights thereto.

In the case of John C. Ferguson, *supra*, one, McBean, had located uncertified soldier's additional scrip. While McBean's application was still in force, Ferguson applied to make homestead entry on the same land and his application was denied by the Commissioner because he held that under the provisions of the Land Office Circular of February 18, 1890, (being the same circular relied upon by appellants in this case as giving them the right of substitution) McBean's application amounted to a segregation of the land so as to prevent any further application therefor.

On appeal, the Secretary reversed the Commissioner, and held that McBean's application did not amount to a segregation, and that Ferguson's application should be received and held to await the disposition of McBean's application.

The Secretary says: "Since the case of Stewart vs. Peterson (28 L. D. 515), the Department has held that any application presented during the existence of an entry of record must be rejected outright, and that no rights can be recognized as having been acquired by the presentation of an application to enter at such time. But the case at bar is different. There was no entry of the tract described and there is none now. McBean presented an application to enter. It was forwarded to your office for consideration and there rejected. His application was simply tentative and the most that it can be held to have done, as has often

been decided, was to protect any rights that he might have as against other applicants, or, in other words used in the books, it was equivalent to an entry only so far as his rights were concerned. Therefore, there is no good reason apparent why the application of Ferguson should not have been held to await that of McBean." (Record, p. 61).

Now it is perfectly apparent why the right of substitution might be given in the cases of state indemnity school land selections and military land warrants, and denied in the case of soldier's additional rights.

In the former cases the applications amounted to entries and absolutelysegregated the land, and the Department holds that, in such cases, no other applications could be made therefor, or rights obtained thereto.

Consequently, in such a case, if the government saw fit to accept a relinquishment of the original right, under which the entry was made, and permit the land to be taken under some substituted right, the transaction concerned no one but the government and the entryman, and no one would be injured thereby, for, at the time of the substitution *there were no intervening or adverse rights to be affected.*

But, in the case of uncertified soldier's additional rights, as we have seen, the location did not amount to an entry, or segregation and, in such cases, other persons were allowed to make subsequent applications for the land, and would gain a preference right to an entry, in case the soldier's additional application should be rejected.

The allowance of the right of substitution, in such case, therefore, would interfere with and affect adverse rights, *existing* at the time of substitution.

This distinction was recognized by the Department in the case of Charles P. Maginnis, *supra*. In that case, speaking of the right of substitution, the Secretary says: "The difference between the two cases is clearly defined in the departmental decisions. An indemnity school land selection, when accepted, and while of record, is held to bar the receipt of any subsequent application until the selection has been formally cancelled. With regard to soldier's additional homestead applications the same is received by the local officers and forwarded without action to the Commissioner of the General Land Office and during its pendency in this condition, that is before it is finally allowed or rejected, other applications for the land may be received and held subject to the final action upon such application." (Record, p. 59).

That Military Bounty Land Warrants fall within the same class as State School Indemnity Land Selections, is made apparent by an admission of counsel for appellants, on page 12 of their brief, in the court below, where they say:

"These decisions of the courts placed the additional homestead right upon the same level with Military Bounty Land Warrants. *There is this difference, however,* that in the case of the latter, the right of a claimant to a warrant is established by proofs submitted to the Interior Department, *prior to its location.*"

In other words, the Military Bounty Land Warrants are examined by the Department, and their validity certified to, prior to location. The location, therefore, constitutes an entry and a segregation of the land, the same as in the State School Indemnity Land selections, and bars the right of application for the land by any one else.

But in the case of uncertified soldier's additional rights, as we have seen, the location amounts to a mere application, until examined and approved by the General Land Office, and does not bar the right of subsequent application by other parties.

The arguments advanced by the Department, in the cases last above referred to show not only that the custom of substitution had not been adopted as to soldier's additional rights, as a matter of fact, but they further show that there were good and sufficient reasons why such custom *should not* be adopted, for the permissal of such a custom would interfere with, and adversely affect, intervening rights already existing and recognized by the Department.

We contend, therefore, that the appellants have not shown that a custom existed in the Department of allowing an applicant, under a soldier's additional right, to substitute a valid for an invalid right, when, at the time of substitution, a valid, adverse application for the land was pending; that the Land Office Circular of February 18, 1890, and the case of Robeson T. White, *supra*, the only pieces of evidence which the appellants have brought forward to establish this custom, do not bear out their contention, and that the De-

partment has distinctly so decided, on numerous occasions; that the fact that the custom of substitution was in force in the cases of State School Indemnity Land selections and Military Bounty Land Warrants cannot be considered as proof of the fact that a similar custom existed as to soldier's additional rights, but such custom as to the latter class must be established by independent and positive proof; that there is a plain distinction between these two classes of cases, and the distinction has been recognized by the Department, and that the reasons given for the distinction show not only that no such custom has ever been adopted, with reference to soldier's additional rights, but further show that such a custom ought not to be adopted.

As the appellants rest their whole contention upon the existence of this alleged custom, we might desist from further argument. But we propose to go one step further and show that the Department had no power to establish such a custom, and that its adoption would lead to absurd and inequitable results.

PART II.

THE DEPARTMENT HAD NO POWER TO ADOPT SUCH A CUSTOM.

Not only has the Department refused to sanction such a practice as is contended for by the appellants, but it would be beyond the power of the Department to grant such a right.

Jurisdiction is conferred upon the Department to *administer* the public land laws, but Congress is the body that creates all rights relating to the public domain, and the Department has no power to either add to or diminish the rights conferred by Congress.

The soldier's additional homestead right was created by Section 2306 of the Revised Statutes, and reads as follows:

"Every person entitled, under the provisions of twenty-three hundred and four to enter a homestead, who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

This statute provides that every person who is "*entitled*" to enter a homestead under the provisions of Sec. 2304, shall have the benefit of this right. The requirement of the statute is positive that the party claiming the right must be *entitled* to enter a homestead under the provisions of Sec. 2304.

The Department found that the James Carroll named in the scrip which Robinson tendered had not rendered any military service and was *not* entitled to exercise the right, consequently, the application of Robinson was utterly inffectual for any purpose.

If Robinson had tendered a certificate of election to some office no one would contend that he, thereby, gained or initiated any right to the land in question. But he could gain just as much right to the land by the tender of such an instrument, as by the tender of a soldier's additional right which was absolutely void.

It is a contradiction in terms and a manifest absurdity to assert that a party can initiate any *right* to enter public land, by the tender of an instrument to which no *rights* can attach.

But appellants say that, while Robinson did not gain any right to the land by virtue of the invalid scrip of James Carroll itself, that, as he tendered it in good faith, believing the scrip to be genuine, he had the right, under the custom claimed by the appellants to have been established by the Department, to a grant of further time within which to substitute valid scrip.

But the trouble with this contention is that there is no warrant for it in the statute. The satute does not permit public lands to be bestowed upon individuals as a gift, or arbitrarily. It is only by the exercise of some right given by the statute that these lands can be obtained.

Furthermore, this right to take the land must exist at the time the land is applied for. The initiation of a right to take public lands cannot be

based upon *good faith,* but depends upon *qualifications,* prescribed by law, and existing at the time the application is made.

In the case of every class of public lands, the qualifications that must be possessed by the applicant to enable him to make entry thereunder are prescribed by the statute itself, and the Department has no power to add to or diminish these qualifications.

In the case of the soldier's additional homestead right, the statute prescribes that one who has rendered certain prescribed military service, and who has already entered less than one hundred and sixty acres *shall be entitled* to exercise this additional right. These are the qualifications prescribed by law.

But, under appellants construction, there would have to be read into the statute, in addition to the above, "and every person who, in good faith tenders a soldier's additional right, believing it to be valid and genuine, shall, in case the right is held to be invalid, be entitled to an additional grant of time, within which to substitute valid scrip."

What authority has the Department to add this additional provision to the law?

It is true of course that if a party applies to enter land with invalid scrip, he may make another application for the same land, with valid scrip, at any time after the invalid scrip has been rejected, provided, that no other valid, adverse rights have attached in the meantime.

In the case at bar, however, as we have seen, the Santa Fe Railway Company had filed its ap-

plication for the land more than six weeks prior to the time that Robinson applied for leave to substitute valid scrip, and this application of the company had been received and noted on the records as subject to the application of Robinson, under the James Carroll scrip. (Complainants Ex. 1, Record, p. 30).

In the cases of John C. Ferguson, *supra,* Charles P. Maginnis, *supra,* and J. E. C. Robinson, *supra,* the rights of the respective parties, in such a situation as this, were clearly defined.

In those cases it was distinctly decided that, where a party applied to enter public land, under an uncertified soldier's additional right, that the application did not constitute an *entry,* that it did not *segregate* the land applied for, but that it should be noted on the records merely as an *application,* and that the local officers should take no further action thereon, until the application had been examined as to its validity by the General Land Office and approved or rejected.

It was further held, in these cases, that the application, under the soldier's additional right, did not bar subsequent applications for the same land, but that where such subsequent applications were made they should be received and held to await the action of the Department upon the prior soldier's additional application, and that in case the latter was approved then the subsequent application should be rejected, and, in case the soldier's additional right was held to be invalid, then the subsequent application should be given the preference right of entry.

As Robinson's application for the land under the Carroll scrip had been rejected, and as the railway company had a valid application for the land, under the law, pending at the time of the rejection of Robinson's application, the company's right to the land became a preferred one and could not be wiped out by allowing Robinson time within which to exercise a new, independent and subsequent right.

The underlying principle of our entire public land system is that the public domain belongs to all of the people alike, and that their right to take it depends upon priority of application, and as the railway company's application was prior to that of Robinson, under the Justus F. Heath right, the land was properly granted to the company.

The appellants nowhere in their brief deny that the application of the railway company was a valid one, that it was pending at the time Robinson applied to enter the land under the Heath right, but they contend that the application under the Heath right was a continuance of, or substitution for, the Carroll right, and as the application, under the Carroll right, was prior to that of the railway company, that, therefore, Robinson was entitled to the land.

The fallacy of appellants' position lies in the assumption that the application under the Heath right, was a continuation of, or was, or could be, a substitution for the Carroll right, so as to interfere with, or adversely affect, a valid application, pending at the time of the so-called substitution.

The application, under the Heath right, was the exercise of a new and independent right.

The Heath right had no relation to, or connection with, the Carroll right. Both were entirely separate and distinct.

The Department found, and the appellants admit, that the Carroll right was void *ab initio*. In other words, it never was a right at all. How, therefore, could the application, under the valid Heath right, vitalize, or give validity to, the Carroll right, which was void from the beginning.

But, in order for the appellants to prevail, it *must* be held that there was some virtue in the Carroll right, and that Robinson gained some rights by his application under it, for, otherwise, he must rest his right to the land entirely upon the application under the Heath right, and to hold that he could take the land under this right alone, would be equivalent to holding that a subsequent application could wipe out a prior, valid application, and this would be a denial of the fundamental principle underlying the administration of the public land laws.

At the time Robinson made his original application he relied upon the Carroll right *alone*. When that right failed he could not come in with a so-called substituted right so as to gain priority over a valid, adverse right then pending.

We submit that the Department was entirely within the bounds of reason and of the law when it said, in reference to his application to substitute, as follows: "It is not denied that the application of the Railroad Company was filed prior to the attempted substitution, nor that its accept-

ance by the local officers, when presented, was in conformity with the settled practice, obtaining in such cases. This practice as was pointed out in the departmental decision in the case of Frederick L. Gilbert et al, (35 L. D.) arises of necessity, because of want of authority of the local officers to pass upon or allow or reject an application of this character, when presented. Robinson cannot escape the consequences growing out of his request to substitute a valid right for an invalid right. The granting thereof was, in effect, a final determination of his rights under the original application and he is charged with notice of what the record contained at the time such request was made. At that date the application of the railroad company was a matter of record and any rights of Robinson initiated subsequent thereto were subject to those of the railway company under its application." (Record, p. 19).

And again: "the simple statement of the facts destroys all the argument in support of such practice. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment, and of these the first one was worthless and, prior to the assertion of the second, the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted." (Record, p. 22).

If Robinson had, in the first instance, filed a valid right, and there was simply some defect, or irregularity, which needed to be cured, it might

be urged with reason that such defect, or irregularity, could be cured, or amended, without destroying the effect of the application.

But such is not the case here. The original right tendered by Robinson was not merely defective, or irregular, it was absolutely void, and could not be cured; and the right tendered in lieu of it was not amendatory of a defective right, but the assertion of a new, separate and independent right.

The Department has always permitted the substitution of valid for invalid rights, and has allowed defects and irregularities in entries to be made, but always upon the condition that they did not conflict with adverse rights already pending.

The law declares that one must be a citizen, or have declared his intention, to enable him to make a preemption filing. But in the case of Jacob H. Edens, 7 L. D., 229, the claimant made his settlement while he was an alien. Notwithstanding this fact, Secretary Vilas held that his entry should be allowed because it appeared that he had afterwards declared his intention *before any adverse claims had attached.*

The same doctrine is also laid down in the following cases:

Kelly vs. Quast, 2 L. D., 627.
Mann vs. Huk, 3 L. D., 452.

In the case of Kelly vs. Quast, *supra,* the Secretary says: "Quast failed to protect himself by making proper settlement prior to filing; *but in the absence of an intervening adverse claim,* the

Government will not interpose any objection to his entry."

In Mann vs. Huk, *supra,* the Secretary says: "It is the settled ruling of this Department that where a defect of this sort exists it may be cured by fulfilling the requirements of law *at any time prior to the intervention of an adverse claim."*

Now if a defective preemption filing cannot be cured where it would conflict with an adverse claim, upon what principle of law could the substitution of a valid soldier's additional right for an invalid one be permitted, where the substitution would operate to the disadvantage of an intervening adverse right."

It is also held in the cases of Ayers vs. Bowber, 15 L. D., 550, and Bayley vs. Mitchell, 19 L. D., 419, that a homestead entry, cancelled for failure to submit final proof within the proper time, could not be reinstated, *in the presence of an intervening adverse right.*

In considering the construction to be given to a statute, it is always proper to take into consideration the results that will be produced by any given interpretation that is contended for.

We maintain that the right to substitute valid for invalid soldier's additional scrip, where it would conflict with adverse rights, would produce absurd, ridiculous and inequitable results, and that the courts will never adopt such an interpretation, where it is possible to avoid it.

If the right of substitution contended for by appellants should be allowed, it would permit designing persons to deliberately withdraw large

tracts of the public domain from market, by filing applications therefor with invalid, or even forged, soldier's additional rights, with the *object* of withholding them from other entries, until such time as the applicants could obtain valid scrip with which to make their entries.

It is well known that there have been thousands of forged additional homestead rights tendered. Under appellants theory large tracts of desirable lands could be applied for with these forged rights, and held with perfect safety, for, when in the course of investigation, the right was declared to be invalid, all the applicant would have to do would be to apply for time within which to substitute valid scrip, and this without any danger of losing the land, for the substituted right would protect him against any prior applications.

On the other hand, under the practice adopted by the Department, the holder of soldier's additional rights, whether valid, or invalid, may apply for land and obtain a *preference* right thereto, but may not withdraw it from the market.

If the soldier's additional right is held to be valid, the applicant gets the land. If it is held to be invalid then the next applicant gets the land.

By this method the public domain is at all times held open *to the first legal applicant*, and all parties are treated on terms of equality.

Again, if the department can practically withdraw land and hold it for an applicant, until he can get out and hunt up valid scrip with which to take the land, how long a time can be given to make the substitution?

There is no statute limiting the time, and if thirty days can be granted, why not sixty?

Furthermore, if one who located invalid scrip through an honest mistake can be given additional time within which to obtain valid scrip, why, on principle, should he not also be given additional time if he makes another mistake and locates invalid scrip when he comes to make his substitution, and so on indefinitely?

As the Secretary said in the Robinson case, the arguments advanced for the right of substition, in such cases, are clearly untenable.

Finally, we contend that a legislative construction has been given on this right of substitution, where it conflicts with an adverse right, by an Act of Congress.

This law will be found in the 27 Stat. L. 593, and in Fed. Stats. Ann. Vol. 6, page 327, and is as follows:—"That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, *and there is no adverse claimant,* and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the Government price for the land."

It will be noticed that this law applies to soldier's additional rights that have been examined and certified to by the Department.

But, even in such cases, the statute provides that in case there is any defect in the scrip it cannot be cured and the applicant allowed the land taken under it, *where there is an adverse claimant.*

Now, if Congress deliberately provided that, where soldier's additional scrip, which had been certified as valid by the Government, had been located on land, and the scrip turned out to be invalid, that, in such cases, the defect could not be cured and the applicant allowed to take the land, in case there was an adverse claimant, upon what theory can it be claimed that Congress, which is the body that creates all rights in regard to public lands, intended that such right should be granted to the applicant under uncertified scrip?

Judge Sanborn, in his dissenting opinion on page 95 of the record, in reply to our contention that the Department had no power to grant additional time to substitute valid for invalid scrip, says:

> "The suggestion is made that the officers of the Land Department had no power to establish the rule and practice of giving to an applicant a short time after his additional homestead right was found to be defective to provide a valid additional homestead right in lieu of it, or to receive the latter in support of his original application in the face of a junior claim. But ample authority to establish and maintain this rule of practice may be found in Sections 441, 453, and 2306 of the Revised Statutes."

Section 441 provides:

> "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:
>
> "The public lands, including mines."

Section 453 provides:

"The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties, appertaining to the surveying and sale of the public lands of the United States." Section 2306 provides:

"Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres."

We contend that there is nothing to be found in any of these sections giving the Land Department the power to grant additional time to substitute valid for invalid scrip, when the so-called substitution would conflict with adverse rights, notwithstanding Judge Sanborn's declaration that said sections confer ample authority on the Department to establish and maintain such rule and practice.

It is not denied that the Department has the power to establish rules affecting questions of practice and procedure. But the Department cannot, under the guise of such authority, either enlarge or diminish the rights created by statute.

In Hartman vs. Warren, 76 Fed. Rep., 162, the court says:

"The land department may undoubtedly make reasonable regulations for the conduct of the business instructed to it and the dis-

charge of the duties imposed upon it, provided, always, that they are not inconsistent with the legislation enacted and the policies adopted by congress."

Congress provided that one who holds a valid soldier's additional right might enter public lands therewith. But, under the rule contended for by Judge Sanborn and the appellants, the Department not only has the authority to confer this upon one who holds a valid right, but if the applicant tenders an invalid right, the Department has the power to grant him an additional and indefinite length of time, within which to go into the market and find a valid right with which to take the land, notwithstanding the fact, that at the time he applies for the grant of such additional time, another legal application is pending for the same land.

This is not *administering* the law, it is *making* the law; it is not the establishment of a rule of procedure or practice, it is the creation of an additional right, not contemplated by statute.

In every public land law that has ever been passed, Congress itself has provided, and has not left to the Land Department to prescribe, the qualifications that an applicant must possess, in order to enable him to enter public lands; and these qualifications must exist *at the time the application for the land is made.*

The old preemption act provided that every person who is the head of a family and a citizen of the United States, or who had declared his intention to become such, might enter one hundred and sixty acres of land.

Would anyone contend that the Department, under the preemption act, had the power to grant additional time to one to perfect his naturalization, where it had been discovered after his application had been received that he was not a citizen, in the face of a valid adverse right pending at the time the application for additional time was made?

Or, would anyone contend that one who did not possess the qualifications prescribed by the homestead act, could be given an additional grant of time by the Department to cure the defect, in the face of a valid adverse right pending at the time the additional grant of time was applied for?

If the Department has no power to grant additional time to preemptors or homesteaders to cure defects in their original applications, where such grant of time would conflict with other adverse rights, certainly there is no rule of reason, logic, or common sense that would confer any such authority upon the Department, in the case of one who had applied to enter public land with soldiers additional scrip, which was void *ab initio*.

Judge Sanborn, in his dissenting opinion, also contended that there was an established custom in the Department permitting one, who had made an application for land with an invalid Solder's additional right, to a grant of additional time, within which to substitute a valid right, and in support of this position he cites the decision of the Commissioner of the General Land Office, in the case of Charles P. Maginnis, rendered on July 19, 1905.

But the learned Judge overlooked the fact, or forgot to state it in his dissenting opinion, that

Thos. Ryan, as acting Secretary, overruled the decision of the Commissioner, that Secretary Hitchcock, on a motion for review, sustained the acting Secretary, and that Thos. Ryan, as acting Secretary, on a motion for re-review, adhered to the ruling made in the two former decisions made by the Secretary. See Record, pp. 53-60.

How a custom in the Department could be established by a decision made by the Commissioner of the General Land Office, when the decision of the latter officer was promptly overruled on three different occasions by the Secretary of the Interior, we are unable to comprehend.

In closing, we desire to call the court's attention to the case of Moss vs. Dowman, 176 U. S., 413, which contains many points of similarity to the case at bar.

In this latter case one, Doran, had made a homestead entry on a tract of land located in Cook County, Minnesota. While the entry was still in full force and effect, the appellant, Moss, purchased Doran's relinquishment for the sum of $1,000.00 and filed both the relinquishment and a homestead entry by herself, in the Duluth Land Office, at the same instant of time. Several weeks prior to the time that Moss purchased the relinquishment of Doran's homestead entry, the appellee, Dowman, settled on the land. Shortly after the relinquishment was filed the appellee, Dowman, applied to enter the land under the homestead act, and a contest arose between Moss and Dowman as to which one had the prior right to the land. The Department upheld Dowman's contention and it was upheld by this court in the case cited above.

In the Moss case, Dowman settled on the land while it was still covered by Doran's homestead entry, and, consequently, any rights that he might obtain, by his s[illegible]nent, were subject to the final disposition of D[illegible]ran's entry.

In the case at bar, the Railway Company made application for the land subsequent to the time that the appellant Robinson applied to enter it, and, consequently, the Railway Company's right to the land was subject to the final disposition of Robinson's application.

In the Moss case, both the Department and the Courts held that the moment Doran's relinquishment was filed Dowman's right to the land attached, he being the next legal applicant.

In the case at bar, both the Department and the courts have held, that the moment Robinson's application, under the Carroll right, was annulled, that the Railway Company's application attached, as being the next legal applicant.

In the Moss case, the appellant Moss sought to tack her own, independent homestead entry on to the homestead entry of Doran, so as to cut off the intervening, *adverse right* established by the settlement of Dowman.

But the Department and the courts held that, as the rights of Doran and the rights of Moss to the land were separate, distinct and independent rights, and as Dowman was a settler on the land at the time Doran's relinquishment was filed, that his right was prior, in point of time, to Moss' homestead entry.

In the case at bar, the appellant Robinson seeks to tack on his application, under the valid

Heath right, to the invalid Carroll right, so as to cut out the application of the Railway Company, pending at the time the Carroll right was declared to be void.

But both the Department and the courts have declared that the Carroll right and the Heath right were separate, distinct and independent rights, and that as the Railway Company had a valid, legal application pending for the land at the time the Carroll right was declared to be invalid, that the right of the Railway Company was prior, in point of time, to the application of Robinson under the Heath right.

In the Moss case, the appellant Moss pleaded that the entryman, Doran, appeared by the records to be the owner of the homestead entry on the land in question; that, under the law, she had a right to purchase his relinquishment, and that she did purchase it in *good faith* and paid $1000.00 in cash therefor, and on account of her good faith in the transaction, which was not denied, she ought to be protected and allowed to perfect her entry as against the claims of Dowman.

But the answer of the Department and the courts to her plea was, that the entry of public lands does not depend upon *good faith,* but upon *qualifications* prescribed by law, and upon priority of application for the land sought to be entered.

Likewise, in the case at bar. the appellant Robinson urged that he bought the Carroll scrip in *good faith,* that he did not know that it was not genuine, and that he ought, therefore, to be granted additional time within which to obtain valid scrip as a substitute for the forged Carroll

scrip, and that pending his search for valid scrip the land should be held open for him, even as against the prior, valid application of the Railway Company.

But both the Department, and the courts, up to the present time, have answered him as they did the appellant in the Moss case, that the right to enter public land does not depend upon *good faith*, but upon *qualifications* prescribed by law, and that one of the conditions prescribed by law is that no one is entitled to enter public land, if at the time he applies to enter, the application of some other applicant for the land is pending. In other words, the public domain is open to all alike, and the law is, and always has been, administered, upon the principle that the *first* legal applicant is entitled to take the land, and that this right to take the land must be based upon a right *existing in the applicant at the time he applies to enter, and cannot be tacked on to some other distinct and independent right.*

We contend, therefore, first, that the appellant has not shown that there was a rule and practice in the Department that one who tendered an invalid Soldier's additional right was entitled to an additional grant of time, within which to substitute a valid right.

We contend, second, that even if such a custom had been shown that it was beyond the power of the Department to establish it, for it would be prescribing, not merely a rule of practice, or procedure, but an additional qualification not prescribed by statute.

For the foregoing reasons we respectfully submit that the decisions of the Circuit Court and the Circuit Court of Appeals should be affirmed.

WM. E. CULKIN,
LUTHER C. HARRIS,
Solicitors and of Counsel for Appellee.

ROBINSON v. LUNDRIGAN.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 108. Argued December 19, 20, 1912.—Decided February 3, 1913.

Where an application for public lands is finally rejected on the ground that the soldier on whose claim the application is based had no right thereto, the case is closed and cannot be kept open for perfection by substituting the claim of another soldier, and the instant the application is rejected the land becomes subject to appropriation by another.

An application must depend upon its particular basis; it cannot be kept open for the substitution of another right than that upon which it was made; and if a practice to do so existed in the Department it was wrong. *Moss* v. *Dowman*, 176 U. S. 413.

Even though the Secretary keeps the case open and afterwards rules in favor of the subsequent entryman, the original applicant is not divested of any rights, for no right had attached.

An application based on an invalid claim of a soldier is not an entry valid on its face which segregates the land from the public domain and precludes its appropriation by another until set aside. *McMichael* v. *Murphy*, 197 U. S. 304, distinguished.

THE facts, which involve the right of one filing an application for public lands based on a soldier's claim, to keep it open after final rejection for substitution of the claim of another soldier, and departmental practice in regard thereto, are stated in the opinion.

Mr. C. D. O'Brien, with whom *Mr. P. H. Seymour* was on the brief, for appellants.

Mr. Wm. E. Culkin and *Mr. Luther C. Harris* for appellee.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Bill in equity by appellants, who were complainants in the Circuit Court, and we shall so refer to them, and to the appellee as defendant, to adjudge defendant trustee for complainants of the S. W. ¼ of the S. E. ¼ of section 13, Township 55 North, Range 26 West of the Principal Meridian, and to compel a conveyance to them. The Santa Fe Railroad Company was impleaded with defendant, but it filed a disclaimer and the suit proceeded against him alone.

The rights of complainants are based upon an application for the lands as unappropriated public lands of the United States by Robinson, one of the complainants, as assignee of one James Carroll. The application was duly entered of record upon the tract and plat book in the local land office and proof of the claim of Carroll for an additional homestead entry was transmitted to the General Land Office for examination and action. Upon investigation the Land Department decided that Carroll was not entitled to make such entry and held Robinson's application for rejection and ordered a hearing to be had on June 29, 1905. Robinson did not appear and a decision was rendered holding that Carroll was not entitled to an additional homestead entry under § 2306 of the Revised Statutes. Robinson was notified of this action and that he had a right to appeal therefrom.

On the twenty-seventh of July, 1905, Robinson filed with the local land office for transmission to the General Land Office an application for leave to substitute in support of his application for entry of the land another soldier's additional homestead right in lieu of that of Carroll. In his application he said he appealed from the order cancelling Carroll's entry, and excused himself for not appearing at the hearing on June 29, 1905, on account

of the sudden and serious illness of his mother, which prevented his attendance at the hearing and also prevented him from providing a representative thereat. He disclaimed a desire to incommode the Department and expressed a willingness to aid it in the adjustment of all matters in which he should be interested. He further said that he was deeply sensible and appreciated the seriousness of defaulting at the hearing and that he did not want the case reopened. He requested a delay of thirty days and asked that the decision of the Register and Receiver of the Land Office be amended so as to grant him a reasonable time within which to perfect his entry.

An order was made allowing him thirty days after notice to file a proper substitute for the right of Carroll. On October 4, 1905, he, Robinson, filed the additional homestead right of one Justin F. Heath.

On February 15, 1906, the Commissioner of the General Land Office accepted the substitute and directed the local land office that upon the payment by Robinson of the legal fees and commissions within sixty days they should allow the entry made by him. He paid the fees as required, and thereupon final certificate No. 715, Cass Lake, Minnesota, Series, was issued to him.

On July 11, 1905, that is, prior to the filing by Robinson of the homestead right of Heath, the Santa Fe Railroad, through the defendant Lundrigan, its attorney in fact for that purpose, filed in the local land office under the act of Congress of June 4, 1897, its application to select the land. The application was received subject to final action on Robinson's application. Upon the allowance of Robinson's application and the issue to him of a final certificate the local land office rejected the application of the railroad company, from which action the latter appealed to the Commissioner of the General Land Office. The Commissioner held that the application of the railroad company constituted a valid intervening adverse right such as to

bar the substitution by Robinson of the additional homestead right of Heath. On February 25, 1907, the Secretary of the Interior affirmed the decision of the Commissioner. Upon motion for review the decision was affirmed May 13, 1907, and, on petition for re-review, reaffirmed July 18, 1907.

In pursuance of this decision Robinson's entry was cancelled, and a patent for the land was issued to the railroad company. The railroad company subsequently conveyed the land to defendant.

The above facts are not denied. It is alleged by complainants that for many years immediately preceding the decision holding Robinson's application for cancellation there was a rule, regulation and settled practice prevailing in the Department providing that upon the rejection of a soldier's additional homestead right, surrendered by the assignee thereof in support of an application under § 2306 of the Revised Statutes, such applicant might substitute in support thereof a valid additional homestead right in place of that rejected.

The existence and validity of the rule is in dispute between the parties and also the legality of the decision of the Interior Department against Robinson's application.

The Circuit Court dismissed the bill and its decree was affirmed by the Circuit Court of Appeals by a divided court. 178 Fed. Rep. 230.

The question in the case is very direct. Robinson's application had no legal foundation, Carroll, upon whose rights it was made, not being entitled to make an additional homestead entry. The question then is, could Robinson substitute another right and give his application precedence over the intervening claim of the railroad company? An affirmative answer is contended for by complainants upon the practice of the Land Office. The defendant denies the existence of the practice and contends, besides, that, if it be established, it is destitute of legal effect.

We have seen that Robinson was given an opportunity to avert the rejection of his application and support it by proof of a right in Carroll. He defaulted; but he did not ask to reopen the case and establish a legal foundation for his application, but that he be given thirty days to "re-script" the land. To this the Commissioner of the Land Office responded, affirming the decision of the local land office rejecting the application and pronouncing "the case closed." He was, however, given thirty days to "file a proper substitute for the right" rejected, and, if he failed to do so, the local office was directed to hold the tract "subject to entry from that time by the first qualified applicant."

On October 4, 1905, he filed as a substitute the right of Justin F. Heath, but on July 11, 1905, the railroad company had selected the lands as lieu lands. The local land office rejected the application of the railroad company on account of conflict with Robinson's entry, subject, however, to the right of appeal. An appeal was taken and Robinson moved to dismiss it. The motion was denied on the authority of the departmental decision in the case of the *Southern Pacific Railway Co.* v. *Charles P. Maginnis, Assignee of William R. Davis*, in which it was decided, the facts being substantially the same, "that a substitution could not be allowed in the face of an intervening adverse right." The decision was affirmed by Secretary Hitchcock and successively upon review and re-review by Secretary Garfield and Acting Secretary Woodruff.

Against these rulings complainants urge previous departmental practice. This practice Robinson urged in his petition for review, and cited in support of it the case of *Germania Iron Co.* v. *James*, 89 Fed. Rep. 811. To the contention and the case the Acting Secretary replied as follows: "In that case the court held that a just and reasonable rule of administration adopted and applied by the Department, became a rule of property and could not be

altered to the prejudice of those who had initiated rights under such practice. But the rule contended for by counsel as governing the case under consideration is neither reasonable or just. Robinson attempted to initiate a right by relying upon the invalid claim of another, and insists that even though the Department would be unwarranted in recognizing such claim he should be allowed to perfect the right thus asserted to the prejudice of a valid intervening right, of which he had notice, by the substitution of another and different right. The simple statement of the facts destroys all the argument in support of such a practice. There is neither reason nor equity in it. Had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented. But such is not the case, as he was relying solely upon the rights obtained by assignment, and of these the first was worthless and prior to the assertion of the second the right of another had attached. The arbitrary destruction of this intervening right in the manner contended for by counsel would be wholly unwarranted."

Little need be added to this reasoning. We are not disposed to review the cases by which it is contended the practice is established. It could only prevail if it were a reasonable administration of the statute. *Webster* v. *Luther*, 163 U. S. 331, 342.

Under § 2304 of the Revised Statutes every private soldier and officer who had served in the Army or Navy of the United States during the War of the Rebellion is entitled to enter under the homestead laws 160 acres of land. We omit the qualifying conditions. Section 2306 provides that every person mentioned in § 2304 who has entered under the latter section less than 160 acres "shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres." This provision is the foundation of Robin-

son's rights. In *Webster* v. *Luther*, *supra*, these sections were considered and it was decided that the right given by § 2306 was intended as compensation and was assignable. When assigned, however, it is the right of the soldier which is transferred and which must be used to make an entry. Necessarily the right must exist before it can be exerted either by him or his assignee. Or, to put it in another way, a baseless or fraudulent claim cannot initiate or sustain a right. Hence the distinction made by Acting Secretary Woodruff between a right in Robinson and a right in his assignor and the observation that "had Robinson been clothed with a right in himself, independent of any right claimed through his assignor, another question might be presented." Hence, also, the decision of Secretary Garfield that "No right of entry is gained by the filing of an invalid application to enter, and upon the rejection thereof the rights of subsequent applicants attach in the order in which they are asserted. By admitting the rights of substitution, irrespective of the intervening rights, the mere filing of an individual soldier's additional application would in effect amount to a segregation of the land." And again, "The refusal of the Department to adopt such a practice does not prejudice the holder of a valid right. The only value of such right lies in the power of the holder to enter thereunder any land subject to it at the date of filing his application. This right is not denied in the present case, as the land there involved was subject thereto only in event there were no prior adverse claims asserted upon which entry should be allowed. The right itself is not destroyed by refusing to allow entry thereunder of this particular tract. The purchaser still has all that he bargained for, and the mere fact that his purchase may have been made upon the mistaken idea that he would be entitled as a matter of right to exercise it upon a particular tract of land does not entitle him to equitable consideration as against a prior, and therefore superior, right of another."

The ruling was right. Each application must depend upon its particular basis. And it cannot be kept open for the substitution of another right than that upon which it was made. If one substitution can be permitted, successive substitutions can be permitted, and there might arise the condition of things condemned in *Moss* v. *Dowman*, 176 U. S. 413. In that case successive formal entries under the homestead law and successive relinquishments of the entries of a tract of land were made. Dowman, who was not a party to the manipulating process, about one month prior to the last relinquishment settled upon the land. It was held that his right attached immediately upon the filing of the last relinquishment and before the last entry, though the latter was made on the same day the relinquishment was filed. It was recognized that the entry which was given up had segregated the land and that no right could be initiated while it stood of record, but it was decided that the instant its relinquishment was filed in the local office the right of Dowman, the settler on the land, attached and the Moss entry could not defeat it. And so in the case at bar, the instant that Robinson's application was rejected as having no legal foundation the land became subject to appropriation by another. No right, therefore, of Robinson was divested by the ruling of the Department, as contended by complainants, for no right had attached. His application, based on the right of Carroll, was not an entry of the land and is not within the ruling of *McMichael* v. *Murphy*, 197 U. S. 304, that an entry valid on its face segregates the lands from the public domain and precludes their appropriation by another so long as it remains undisturbed.

Decree affirmed.